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SIR HENRY MAINE

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SIR HENRY MAINE

A BRIEF MEMOIR OF HIS LIFE

BY THE RIGHT HON.

SIR M. E. GRANT DUFF, G.C.S.I.

WITH SOME OF HIS INDIAN SPEECHES AND MINUTES

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MEMOIR

OF

SIR HENRY MAINE

It has been thought desirable that a sketch of Sir Henry Maine, somewhat fuller than the notices which appeared after his death, should be prefixed to this volume.

His was a life which contained but few incidents. He was never connected with great affairs, save in India and at the India Office, and the great affairs with which he was connected were not of a kind to attract the attention of even well-informed readers who are not specially interested either in the country to which he gave so much of his thoughts, or in legal history and jurisprudence. His only adequate monument is to be found in his works. A life of him of the regulation size could no doubt be compiled according to the regulation fashion; that is, by stringing together great numbers of his letters to various official personages at home or in India when he was serving at Calcutta or Simla; but they would not be of any general interest, and he was far from being much given to writing letters, either for the pleasure of doing so or for the purpose of keeping up relations with private friends.

The objections which militate against attempting to write a regular life of Maine do not seem to me to have any bearing upon a brief memoir, intended merely to put on record the principal dates and facts in the life of a man whose writings have been an honour to his age, and who did admirable

service to the State; who had no enemies, and who has left on the minds of all those, who had the privilege of knowing him well, an absolutely unclouded memory.

Henry James Sumner Maine was the son of Dr. James Maine, who, himself a native of Kelso, on the Scottish Border, married Eliza, the fourth daughter of Mr. David Fell, of Caversham Grove, a gentleman of good position residing in the neighbourhood of Reading. He was born near Leighton on August 15, 1822, and spent his very earliest years in Jersey; but family difficulties soon supervening, he was removed to England, and was brought up thenceforth exclusively by his mother, a clever and accomplished woman, who resided chiefly at Henley-on-Thames.

Some recollections of his childhood have been preserved by an aged relative, and have been kindly communicated to me. They bring before us a pretty child of two years old, with fair wavy hair and blue eyes. They preserve, too, the fact that he was all but poisoned at that early period of life by an overdose of opium, administered by his doting mother and an equally devoted aunt. As Fate destined him to have so much to do with the Government of India, it was fortunate that he retained no grudge against the poppy. This alarming event occurred at Caversham Grove. We next hear of him at a school kept by a Mrs. Lamb, who had long been governess in the Fell family, and resided after her marriage in the Fair Mile, in Henley.

In 1829 his godfather, Dr. Sumner, then Bishop of Chester, and later Archbishop of Canterbury, procured for him a nomination to Christ's Hospital, where he very soon showed remarkable ability. The tablet put up to his memory, in the cloisters of that institution, records the fact, which will not be disputed, that by his death the school lost 'a most illustrious son,' and at various periods of his life its authorities marked their sense of the honour he conferred upon it, by congratulations and gifts.

In 1840 he went as an Exhibitioner of Christ's Hospital to Pembroke College, Cambridge. Founded the year after Crécy by Mary de Valence, whose husband, Audemard de Valence, Earl of Pembroke, was killed at a tournament on his wedding-day, that ancient house had had its fair share of distinguished men, especially of ecclesiastics, of whom Ridley and Andrewes are perhaps those best remembered; but its three chief ornaments had been Spenser, Gray, and the younger Pitt.

Maine's undergraduate career was exceptionally brilliant. In 1841 he was elected a Foundation Scholar of his College. In 1842 he gained the Chancellor's medal for English verse, the Camden medal for Latin hexameters, and the Browne medal for a Latin ode. In 1843 he gained two more Browne medals—the one for a Latin ode, the other for a Greek and a Latin epigram—becoming also Craven University Scholar.

His English Prize Poem of 1842 was on the birth of the Prince of Wales. It is an exercise in ten-syllable verse of the conventional kind, showing no particular promise. Perhaps as good lines as any in it are the following about Cambridge :—

> And now, when time has quench'd the power which gave
> Ethereal music to Castalia's wave,
> Has torn the magic from Hymettus' brow
> And left Soracte nothing but her snow,
> She guards in many a speaking tome enrolled
> The glorious spirit of the days of old—

The first of the odes celebrates the launching of a ship of war, built, as ships of war were fifty years ago, of British oak, which naturally comes much to the front in these verses. The vessel bore Nelson as its figure-head, whence the following vigorous lines :—

> Quin quære pontum ; et Pleïadum chorus,
> Et si quid inter sidera purius
> Candescit, illucens eunti
> Subveniat : neque tu minorum
>
> Ibis favori credita numinum,
> Cui, fabulosâ luce potentior
> Pollucis, in prorâ sedebit
> Effigies veneranda tanti

Herois : ille ille abdita dexterâ
Saxa indicabit prævius, et suo
Gaudebit infuso calore ad
Arma suos stimulâsse cives !

Nothing could be further than the exploits of the British Navy from the subjects which were to be most closely connected in after-life with the business and tastes of him who thus sang them. His other ode, which was on the Indus, marks, so far as I am aware, his first connection with the land to which that river gave its name ; but it contains nothing which lends itself so well to purposes of quotation as the lines I have already cited. The same may be said of the hexameters upon 'Cæsar at the Rubicon,' a subject which probably did their author one good turn in making him study Lucan, a writer who, at least at Oxford, was in those days absolutely neglected—most unwisely, as I venture to think, by those who, training for public life, remember the saying, 'Proximus oratori poeta ;' and I could support my opinion by the authority of Lord Ellenborough, as great in relation to eloquence as it is worthless in relation to statesmanship.

Of the odes and Latin hexameters nothing more need be said, save that they sustain all the tests which can be fairly applied to that most artificial and unsatisfactory form of composition, while they as certainly do not sustain the tests which their gifted author would in later years have applied to compositions in any language whatever. I know no sounder advice than that which he gave to the Bengali students in Calcutta :—

'And now, as I am on this topic, I will observe that there is one characteristic of these papers which has struck me very forcibly. It is the extraordinary ambition of the Native Student to write the best—perhaps I should rather say the finest—English. In some cases the attempt has been singularly successful ; in others it has failed, and I think I may do some good to the Native Students present if I say why I consider it has failed. It has failed, then, because the attempt

has been too consciously and deliberately made. Of course I do not forget that these students are writing in a foreign tongue, and that their performances are justly compared only with those Latin themes which some of the gentlemen around me have written in their youth. But on the other hand, the English of a Bengali lad is acquired for permanent and practical purposes, to be written and spoken to and among those who have written and spoken it from their infancy. Under such circumstances, English can only be well written by following the golden rule which Englishmen themselves follow, or ought to follow, and that rule is never to try deliberately to write it well. Depend upon it, no man ever wrote well by striving too hard to write well. What you should regard, is not the language but the thought, and if the thought be clearly and vividly conceived, the proper diction, if the writer be an educated man, will be sure to follow. You have only to look to the greatest Masters of English style to satisfy yourselves of the truth of what I have said. Take the first illustration which always suggests itself to an Englishman, and look at any one page of Shakespeare. After you have penetrated beneath the poetry and beneath the wit, you will find that the page is perfectly loaded with thought; and so, you may depend upon it, it will always be at all times and with all writers. The more you read, the more convinced you will be that the finest fancies are formed, as diamonds are said to be formed, under the pressure of enormous masses of thought. The opposite process, that of trying to bring in, at all hazards, some favourite phrase or trick of language, will only lead you to a spurious and artificial result.'

The very ungallant but rather amusing Latin epigram may be quoted in full. Now that Woman carries off not only the highest mathematical, but the highest classical, honours which Cambridge has to bestow, she may perhaps desire to reply to it, and to conquer her satirist with his own weapons.

Olim Menalcæ Myrtalen, parem pari,
Fausto jugales vinculo tædas ferunt
Sociâsse: necdum menstruum confecerat
Diana cursum, quum puer casu foras

Egressus ultro Myrtales secum suæ
Laudare mores, "Quam bene est papæ! viris
Nactis lepidulam conjugem! at certe meâ
Nec ipsa turtur noverit concordius
Spirare: næ vix illa nubilat semel
Quot sunt dies in mense, qui si fugerit
Amore plenus, suaviis, amplexubus
Et melle, qualis annus expectandus est!"
Dixit: loquentem audit: colaphus impingitur:
"Cœnâne frigescente cessas, verbero?"

In 1843, the subject for the English Prize Poem was Plato. Maine was a candidate, but not the successful one, though the composition which he produced was very much superior to his fortunate venture of the year before.

Here is the conclusion:

The least of things, like little tunes which stir
A thousand memories in a traveller,
Waken'd his spirits sleeping; and anon
His thought, deserting that he looked upon,
Slid to the land of dream, and wove around
A various fabric on the narrow ground—
And yet he dream'd not: we who every hour
Build grain by grain the mass of human power,
Must bow before our Master, who but stood
And nurs'd the juices working in the bud
And might not tend the flowering, who but fed
The stream of Science at its fountain head.
Now spreads the flower: now roars the stream: and we
See but his hope become reality.

Maine's latest verse compositions were, so far as I am aware, those which he contributed to the 'Arundines Cami.'

In 1844 he was Senior Classic, and having been able without much difficulty, though at the expense of a considerable loss of valuable time, to comply with the perverse regulation which then obliged candidates for the Chancellor's Senior Classical Medal to take Honours in Mathematics, he tried for and won that high distinction. Unfortunately, however, no Fellowship was vacant at Pembroke, and he accepted an invitation from Trinity Hall to become Tutor

there. That position he occupied for two years, and in 1847, at the very unusually early age of twenty-five, he was made Regius Professor of Civil Law.

I have never come across anyone who was intimate with Maine in his early days at Cambridge, but Mr. Franklin Lushington, a distinguished member of a distinguished family, knew him from 1843 to 1847, and has been obliging enough to send me the following notes :—

'Not long after taking his B.A. degree, Maine was elected Tutor of Trinity Hall, and in 1847 he was nominated Regius Professor of Civil Law, a stepping stone in his career which may rightly be looked on as the first definitive call to that great study to which he gave, in one phase or another, so much of his mind and so many years of his life. Those who were intimate with him during these years of his academical course will not easily forget his face and figure, marked with the delicacy of weak health, but full to overflowing with sensitive nervous energy—his discursive brilliancy of imagination and intellect —his clear-cut style and precise accuracy of expression— and his absolute power of concentrating himself on the subject immediately before him. His mind was so graceful that strangers might have overlooked its strength, while the buoyancy of his enthusiasm was never beyond the control of the most critical judgment. His only fault lay in the habit of burning his candle too fast, by working without intermission and without any sort of physical recreation, for which indeed he had no natural turn. It was hard to drag him away from his rooms and his books, even for the ordinary minimum of constitutional exercise, though his spirits and width of interest made him at all times a joyous companion. Filled with the highest ambitions, and gifted with an insatiable power of work, Maine might be truly said at this period of his career to have striven to realise in his practice the uncompromising motto, "Semper arcum tendit Apollo."'

The present Master of Trinity Hall, in an excellent address delivered in the Chapel there on February 8, 1888, spoke as follows :—

'My thoughts carry me back to the time when the Master and I were undergraduates—he at Pembroke and I at Trinity. He was my senior in standing by a year. I first heard of him as getting the Chancellor's medal for the English Prize Poem, together with the Camden and Browne medals, and I first saw him at the recital in the Senate House. His appearance was bright and striking. He had come up young, and except for passing looks of thoughtfulness, his appearance was very youthful. The general character of his countenance he retained nearly to the last, for any old friend who had not seen him since college days would have recognised him at once a month ago. It was remarked that his voice in recital was singularly clear: as some one said of him, "It was like a silver bell."'

'Men were not in those days distributed by open scholarships as they are now, and candidates for the Classical Tripos congregated very much at Trinity College. Of these a large number were my friends, and we all, classics and mathematicians alike, looked to our great hero—an admirable scholar and a man of extraordinary general gifts—to take the first place in the Classical Tripos. Gradually, a rumour spread of a strong man at Pembroke; shortly, to our dismay, the Craven Scholarship was awarded to "Maine, of Pembroke." Then commenced a Homeric conflict between the heroes of scholarship; sometimes one got a University prize, and sometimes the other. The whole College was interested in a way that you would hardly now understand. The final victory remained with our late Master, who was Senior Classic and Senior Medallist in 1844. And now that both competitors are gone, what is most pleasant for a surviving friend of each is to think that throughout the contest they were always friends.'

The Hector of Trinity who fell before the Achilles of Pembroke was Mr. W. G. Clark, long known as 'Clark the Public Orator,' who died a good many years before his rival, regretted by all who knew him.

In 1852, Mr. Bristed, an American gentleman, published a book called 'Five Years at an English University,' which

is already curious, and will become in another hundred years very valuable to anyone who writes the history of Cambridge as it was just before it was caught by the current of educational reform, which began to run so strongly both there and at Oxford in the first years of the second half of the nineteenth century. Mr. Bristed, who possessed considerable ability, read for Honours and became Maine's first pupil—I suppose in 1844. He says:—

'I had some curiosity to see how this tutor of mine, so young as he was, about two years my junior, and fresh from a team himself, would get on at first, and whether his known cleverness would help him or be in his way. The result removed all doubts and surpassed my most sanguine expectations. I could feel that I was being admirably jockeyed. He had the greatest dexterity in impressing his knowledge upon others, made explanations that came to the point at once and could not be misunderstood, corrected mistakes in a way that one was not apt to forget, supplied you with endless variety of happy expressions for composition and dodges in translation—in short, I was conscious of making progress with him every day, and only regretted that I could not continue with him through the Long.'

The following passage from the same author may also be cited:—

'I have some of these after-dinner groups in my mind's eye now—Travis, a sort of small Borrow, all but the belligerency, knowing all manner of out-of-the-way languages and out-of-the-way places, ready to talk about any subject, all things by turns, and nothing long: now making a pun, now telling a gipsy story, now joining in a grave critical and now in a graver theological discussion, always very brilliant and plausible, but not always very logical;—the tall, grave, statuesque Plato lecturer, half admiring, half ashamed of his apostolic *confrère*, dropping his magisterial decisions in polished sarcasms;—E——, the poetic-looking Senior Wrangler (who was an exquisite in his dinner costume, and always got him-

self up as carefully for a bachelor party as if he were to meet a roomful of ladies), conspicuous in his crimson waistcoat, speckled stockings, and very symmetrical white tie, occupying the most comfortable chair in the room, seeing through everything and everybody with his searching eyes, and occasionally with two or three of his close sentences tumbling down all that Travis had been saying for the last half-hour ;—Henry Hallam, maintaining a modest silence as the youngest man present, but looking so eloquent that everyone wanted him to talk, till at last he *would* talk, wonderfully ;—the Pembroke man, also backward to speak before his elders (he had the rare merit of being either a talker or a listener, as circumstances demanded), but, when he did speak, putting in keen and rapid remarks that told like knock-down blows.'

Travis is doubtless Tom Taylor, the Plato lecturer the last Master of Trinity, E—— Ellis, and the Pembroke man Maine.

I have sometimes thought that my friend's abilities would have found an even more congenial field at Oxford than they did at Cambridge. True it is that, although he was too civil to say so, except to those with whom he was very intimate, he regarded most of his Oxford contemporaries as just a little off their heads, and believed that they owed that condition of mind to the extraordinary farrago of notions made up of Aristotle's Ethics, Patristic Theology, Formal Logic, High Church enthusiasms, and what not, with which their University so bounteously fed her more studious sons during the Forties. His view may or may not have been a correct one. An Oxford man is not likely entirely to subscribe to it ; but Maine's intellect was so strong and so clear that he would have passed scatheless even through a prolonged course of what was then known as 'Science' on the banks of the Isis, while his undergraduate career would have exactly synchronised with the most interesting and exciting period in the modern history of Oxford.

In 1847 he married his cousin, Miss Jane Maine, who

survives him. His new responsibilities made it necessary for him to prepare for the active duties of a profession, and in 1850 he was called to the Bar. Even at the very beginning of his married life he had written a little for periodicals, but his earliest performances in that line with which I am acquainted belong to the year 1841, and were contributed to the 'Morning Chronicle,' which, under the direction of Mr. John Douglas Cook, of whom I shall have to speak farther on, had recruited a great deal of young ability at both the two old Universities.

A great many of these articles deal with French politics. The very first in the collection which I have had the advantage of examining is upon speeches of Thiers and Montalembert, soon after the election of Louis Napoleon as President. Not a few relate to America, and their author kept up, to 1883 at least, a considerable interest in the affairs of that country, as all readers of his book on Popular Government know well. Now and then he writes of Germany and of Hungary, but of these countries he knew next to nothing, and his contributions to the discussions of their excessively complicated affairs had no special value.

His sympathies in those days were, so far as English politics were concerned, entirely with that section of his party which had followed Peel, and nearly all of whom, a few years later, joined the Liberals.

Maine's early leaders are full of hatred for a man who was the object of very general dislike, both amongst his opponents and in his own party, till his extraordinary abilities and absolute want of scruple placed him at the head of the great Conservative majority of 1874, and led to his apotheosis by a political connection to which he never at heart belonged, and which, till quite near the end of his life, profoundly distrusted him. Here are two specimens:—

In 1849 Maine speaks of that eminent person as believing in Protection 'with the same intensity of faith which

animated General Bonaparte to profess Islam.' About the same time he addresses Mr. Disraeli's followers in these words:

'Already you are manifesting considerable aptitude for the policy which has conducted your leader to eminence—already the Jacobinical colouring of your language and argument shows that you are not indisposed to alternate Conservative commonplace with Revolutionary verse and Radical prose. All that you have to learn is the art of diverting attention while you shift your views, the unintelligible gabble of the thimble-rigger as he changes his peas. When you have mastered this accomplishment, the rest is quite simple.'

Maine's leaning to moderate Liberalism extended as well to foreign as to home questions. Here is an extract from an article of the year 1849, very creditable as well to his good sense as to his powers of prevision:—

'We have no wish, in the present state of our information, to pronounce on the greater or less proximity of a *coup d'état*. But we may be permitted to say that the doubtful expediency of such a step is the strongest reason for disbelieving its imminency. Looking to the prospects of French Conservatism—and it is certain that the interests of Conservatism would be the pretext of the attempt, if made—we are not disposed to think that it would gain as much as it would lose by the destruction of the young democracy. The elevation to a throne of Louis Napoleon or the Count de Chambord would, of course, have the effect of making the depository of authority stronger for the time in material force, but it would at once transfer to the ranks of the discontented the more devoted partisans of the rival dynasties, and would add immeasurably to the moral strength of the common enemy. And who can say how long the sceptre would remain to any line of French kings? Twenty more years might bring another February 24, and, that time at least, the victory would be to Socialism alone, to Socialism schooled and warned by the events of 1848! To judge from

probabilities and the past, universal suffrage is likely to give the party of Order a lease of power quite as long as the concentration of authority in a single hand. Indeed, when the venture of universal suffrage has been once tried with safety and success, it would be unwise, under any circumstances, to cast abroad anew in the field of political experiment; and more than unwise in the circumstances of France. The claims of three great dynasties, based respectively on Prescription, Possession, and Prestige, fall at once into abeyance when the nation assumes to guide its own steps. If the attempt prove immature, and the staggering commonweal is in peril of falling, France must brave the danger of allowing their pretensions to revive and conflict. But so long as it moves steadily forward, to strike it down or trip it up, at the cost of turning into gall the best and wholesomest blood in the whole of France, would be a great piece of foolishness no less than a great crime.'

In 1852 the Inns of Court, which had seen serious reforms begun both at Oxford and Cambridge, determined to follow so good an example. They appointed five readers—in Roman Law and Jurisprudence, in Real Property, in Equity, in Common Law, and in Constitutional Law. They created also a number of studentships, to be awarded to those young men who had acquitted themselves best in examinations to be held three times a year upon the lectures delivered and the books prescribed by the readers.

It was the first of these examinations which made me acquainted with Maine, in the spring of the year 1853, and I followed both his public and private lectures for several years very conscientiously. The public lectures were given in the beautiful hall of the Middle Temple, one of the noblest rooms in London, and the first place, it is said, in which Shakespeare's 'Twelfth Night' was acted. Maine was a most admirable lecturer; his voice was exceptionally powerful, his style like crystal and every sentence perfectly finished. As to the scientific value of the lectures which he read, it is enough to

say that the expressed essence of several courses was afterwards given to the world in 'Ancient Law.' Those of his private lectures which I attended turned chiefly on the Institutes of Gaius, which he introduced to me, and to a good many, I believe, of my contemporaries who remained devoted to studies which I entirely relinquished not long after the period of which I am speaking. What struck me most about him as a companion, at this time, was the strange contrast between the excessive fragility of his appearance, for he was just recovering from an illness which had been all but fatal, and the vigour of his mind. His talk was singularly bright, alert, and decided; you could not walk a couple of hundred yards with him without hearing something that interested you, and he had the enviable power of raising every subject that was started into a higher atmosphere. In later life he became much more silent, and did not seem to put his intelligence, so to speak, as quickly alongside that of the person to whom he was talking.

Maine practised for a very short time at the Common Law Bar and belonged to the Norfolk Circuit; but he soon went over to the Equity branch of his profession. Health, however, much interfered with his work, and his liability to violent and varied attacks of illness, during the years when a practice is usually built up, would, I suspect, have made anything like the work of a fully employed lawyer quite out of the question for him.

In the September of 1855 he spent ten days at my father's house in Aberdeenshire; his mind was then full of a weekly newspaper which was about to appear, and it was he, I believe, who, immediately before or after this visit, suggested the name which has since become very famous, 'The Saturday Review.' It made its *début* in November, and Maine wrote in the opening number. The first editor was Mr. John Douglas Cook, already mentioned, a very shrewd Scotchman who came, I think, originally from Kincardine or one of the

neighbouring counties. He never had much education and did not write at all himself; but he had great skill in finding others who could, and often made very judicious corrections in the work of men immeasurably superior to himself both in ability and acquirements.

And a very brilliant band he managed to collect together in the early days of his new venture. Of these the two who have filled the greatest space in the world's eye since were Lord Salisbury and Sir William Harcourt; but Sir James Stephen, Mr. Goldwin Smith, Mr. Walter Bagehot, Professor Owen, Mr. T. C. Sandars, Mr. George Venables, and a great many more formed part of it at, or soon after, the outset. From three years to three years, generation after generation came from the banks of the Cam and the Isis to serve under the banner of the old literary *condottiere*, who was, to use the phrase of one who knew him well, 'thoroughly *bon enfant*,' but whose experiences as related by himself had been of a highly uncommon and sensational character.

Venables proposed at one time to write an essay after the German fashion on *Das Cookische Ich*, in which he intended to set forth the various persons and companies of persons into whom, after a long and intimate study, he thought he could resolve the pronoun 'I' as used by our old friend.

I do not think there was anyone whose contributions this peculiar but sagacious personage valued more than those of Maine. He wrote on all kinds of subjects, sometimes reviewing books, oftener contributing leading articles. One series of these, which he wrote in 1857–8, was, I think, particularly successful. It was devoted to the defence of the system of Indian government which was swept away in the last-named year. I did not agree with them, thinking that, although a great many reasons given for the change were futile enough, the great convulsion of the Mutiny and the public excitement following thereon had created a convenient opportunity for putting an end to arrangements which had

grown up as the result of numerous historical accidents, not of set purpose, and which were certainly cumbrous in the extreme.' No one, however, admired more heartily than I did the dexterity with which my friend brought out every point that could be raised in favour of his clients. A portion of one of these articles I venture, by the permission of the present editor, to transfer to these pages. It appeared in December 1857:

'Even though the proposed consolidation of administrative functions should involve the merest change of title, and in effect simply substitute a *Council of India* for the Court of Directors of the East India Company, it would be impossible to reflect without emotion on the extinction of so mighty a name. *In hoc signo vicimus.* That wonderful succession of events which has brought the youngest civilisation of the world to instruct and correct the oldest, which has reunited those wings of the Indo-European race which separated in the far infancy of time to work out their strangely different missions, which has avenged the miscarriage of the Crusades by placing the foot of the most fervently believing of Christian nations on the neck of the mightiest of Mahometan dynasties—will inevitably be read by posterity as the work, not of England, but of the English East India Company. We may be permitted to express our disgust at the mode in which the proposed dissolution of this great Association was first proclaimed to the world. The language employed cannot, and should not, be forgotten. It is one proof among many that we are not quite worthy of our history. It is one illustration among many of that nameless touch of vulgarity which robs us with our contemporaries, as it assuredly will rob us with posterity, of the honour which is due to our freedom and our glory. The fact, or the probability, that the East India Company would be extinguished was announced for the first time in the same sentence with a sneer at its "antique traditions" and in the middle of what we must call an impudently fictitious apology for the supineness of the department which systematically spoils its policy. The antique traditions of the East India Company!—they are Conquest and Government. Not one

of those who are eager to share the fruits of its patience and energy—not the Crown and Parliament which fooled away between them the only empire we ever had which could be compared with India—not the malcontents at Calcutta, who want liberty to capitalise and tyrannise—not the religious world, which means to convert all the Hindus without exception as soon as it has quite settled whether there are to be preachings in Exeter Hall—not one of these has moved one finger in the establishment of our Eastern dominions except to imperil and retard it. "The partisans of the Directors," said the journalist charged with tolling the Directors' knell, "believe that India belongs to the Company." India does indeed belong to the Company in one sense, and the vested right is one which no amount of shameless calumny will succeed in extinguishing. No transient libels will dissociate India from that Board of Administrators which traces its pedigree to a company of merchants, just as the most famous and durable polity of the Middle Ages was born among the traffickers of the Venetian lagunes. Of course no perpetuity can be claimed for the East India Company, which is only the form in which English energy has embodied itself. But, for all that, to announce its dissolution, or even its rebaptism, in the coarse commonplaces of the platform agitators, is to treat a great historic power with an ignoble variety of the neglect which broke the heart of Cortez, and of the ingratitude which dishonoured or assassinated Labourdonnais, Lally, and Dupleix.'

A little before the time of which I am speaking there began to appear at each of the two Universities a series of monographs, long since discontinued, which were known respectively as the Oxford and Cambridge Essays. To the Cambridge volume of 1856 Maine contributed an extremely characteristic paper on Roman Law and Legal Education. Many of the views which found expression in it have been so widely adopted since as to rob it of some of the attraction which it had for its first readers six-and-thirty years ago; but portions of it might still be read, marked, and inwardly digested

with considerable advantage to the Public Service. Here is one of them :—

'It is the secret belief of many of the most accurate minds in England that International Law, Public and Private, is a science of declamation, and when phraseology intended by the writer to be taken strictly is understood by the reader loosely, the impression is not at all unnatural. We cannot possibly overstate the value of Roman Jurisprudence as a key to International Law, and particularly to its most important department. Knowledge of the system and knowledge of the history of the system are equally essential to the comprehension of the Public Law of Nations. It is true that inadequate views of the relation in which Roman law stands to the International scheme are not confined to Englishmen. Many contemporary publicists writing in languages other than ours have neglected to place themselves at the point of view from which the originators of Public Law regarded it, and to this omission we must attribute much of the arbitrary assertion and of the fallacious reasoning with which the modern literature of the Law of Nations is unfortunately rife. If International Law be not studied historically—if we fail to comprehend, first, the influence of certain theories of the Roman jurisconsults on the mind of Hugo Grotius, and next, the influence of the great book of Grotius on International Jurisprudence—we lose at once all chance of comprehending that body of rules which alone protects the European Commonwealth from permanent anarchy, we blind ourselves to the principles by conforming to which it coheres, we can understand neither its strength nor its weakness, nor can we separate those arrangements which can safely be modified from those which cannot be touched without shaking the whole fabric to pieces. The authors of recent international treatises have brought into such slight prominence the true principles of their subject, or for those principles have substituted assumptions so untenable, as to render it matter of no surprise that a particular school of politicians should stigmatise International Law as a haphazard collection of arbitrary rules, resting on a fanciful basis, and fortified by a wordy rhetoric. Englishmen, however—and the critics alluded

to are mostly Englishmen—will always be more signally at fault than the rest of the world in attempting to gain a clear view of the Law of Nations. They are met at every point by a vein of thought and illustration which their education renders strange to them; many of the technicalities delude them by consonance with familiar expressions, while to the meaning of others they have two most insufficient guides in the Latin etymology and the usage of the equivalent term in the non-legal literature of Rome. Little more than a year has elapsed since the Lower House of the English Parliament occupied several hours with a discussion as to the import of one of the commonest terms inherited by modern jurisprudence from Roman Law. Nor are these remarks answered by urging that comparative ignorance of International Law is of little consequence so long as the parties to International discussions completely understand each other, or, as it might be put, that Roman Law may be important to the closet-study of the Law of Nations, but is unessential as regards diplomacy. There cannot be a doubt that our success in negotiation is sometimes perceptibly affected by our neglect of Roman Law; for, from this cause, we and the public, or negotiators, of other countries constantly misunderstand each other. It is not rarely that we refuse respect or attention to diplomatic communications, as wide of the point and full of verbiage or conceits, when in fact they owe those imaginary imperfections simply to the juristical point of view from which they have been conceived and written. And on the other hand, State papers of English origin, which to an Englishman's mind ought, from their strong sense and directness, to carry all before them, will often make but an inconsiderable impression on the recipient from their not falling in with the course of thought which he insensibly pursues when dealing with a question of public law. So long as they cannot be disentangled, English influence suffers obvious disadvantage through the imperfect communion of thought. It is undesirable that there should not be among the English public a sensible fraction which can completely decipher the documents of International transactions, but it is more than undesirable that the incapacity should extend to our statesmen and diplo-

matists. Whether Roman law be useful or not to English lawyers, it is a downright absurdity that on the theatre of International Affairs England should appear by delegates unequipped with the species of knowledge which furnishes the medium of intellectual communication to the other performers on the scene.'

During the years, however, from 1855 to 1861 the 'Saturday Review' remained Maine's principal means of communicating with the public outside that small portion of it which was engaged in legal studies. In the last-mentioned year, however, he took a step which at once gave him a very high position amongst men of letters: he published 'Ancient Law.'

The success of that work was very rapid as well as very great. Amongst the earlier notices two which specially pleased its author—the first as giving an accurate account of the book, the second as discussing very ably some of the questions raised in it—appeared, the one in the 'Scotsman,' from the pen of an anonymous writer, the other I forget where, from the pen of its author's distinguished pupil and friend, Mr. Frederic Harrison.

To dwell upon the contents of a treatise on which every one who cares for juridical subjects at all and is under fifty has been brought up, would be a vain labour; but I apprehend that the best authorities on such matters would tell us that though 'Ancient Law' made an epoch in the history of English legal education, and though, at least for several generations to come, it will have to be studied, not a few of its conclusions would probably be modified if its author were writing now. Sir Frederick Pollock, for example, said in a lecture delivered at Oxford and published in the 'Contemporary Review':—

'It was inevitable that Maine's works should become text-books; but whoever takes them merely as text-books condemns himself to lose the better half of their value. Thus "Ancient Law" is of permanent importance as a leading type

of the comparative method which has in the present generation become familiar. Its principal instances are taken, and for good reasons, from the history of Roman Law. Maine followed the best authorities then in existence in his presentment of that history, and also with good reason, for, even if his taste and inclination had been to controvert accepted views in detail, he still could not have done so without making his book a critical monograph on the historical problems of Roman Law, which it was expressly not meant to be. Few of these historical inferences or assumptions appear at this day quite so probable as they did in 1861. Some of them now appear decidedly improbable. It might be safe to say that one or two are finally disproved. Yet a student who should think he had nothing to learn from Maine's discussion, for instance, of the early history of contract would commit a more dangerous error than one who should read the discussion and omit to inquire whether its data could still be trusted. He would err more dangerously, because omissions or mistakes in matters of information may be corrected at any time, but the discipline which comes of tracing the methods of great masters must be acquired while the mind is plastic, and, if omitted then, can hardly be supplied in later life. To Maine, who began his work in the mighty and still present shadow of Savigny, and might have seen Savigny alive, Savigny's historical deduction of the Roman verbal contract from an archaic Roman form of conveyance appeared conclusive. At this day nearly a generation of active work and discussion has intervened, and the prevailing opinion is that the origin of the stipulation must be sought in a wholly different quarter. But this in no wise affects the general interest of the phenomenon with which Maine was concerned, and for the sake of which the origin of the Roman stipulation, whatever the true solution may be, is of more than technical importance: namely, the slowness with which the modern conception of contract—the right and the duty of the civil magistrate to compel the fulfilment of promises made by citizens of the State—has everywhere been developed. And the final solution will be found, whenever it is found, by working with the instruments which Maine has left us.'

Before the end of the year in which 'Ancient Law' appeared, Sir Charles Wood, the late Lord Halifax, offered Maine the Law Membership in the Council of the Governor-General, the same office—somewhat, however, exalted in power and dignity—which had been so brilliantly filled by Macaulay. Maine consulted the physician who was then considered the highest medical authority on the health of Englishmen in India, and was told that if he went to Calcutta his life would not be worth three months' purchase. He accordingly declined the appointment, and it was given to Mr. Ritchie. That gentleman, however, died in a few months, and again, in 1862, the same Secretary of State renewed his offer. Maine took counsel with his friends, and I for one, having seen the wretched condition of mind into which he had been thrown by feeling himself obliged to decline the former offer, strongly urged him to go, not at all because I believed that his medical advisers were mistaken, but because I thought that he would infallibly die at home, and that it would be a great deal better for him to die in much prosperity in India than to die in great adversity in England. Never was a presentiment more delightfully falsified. He came back on six months' leave, after two years and a half spent in the East, looking infinitely better than I had ever seen him do, and so little had the thread of his European life been broken by his absence that, as he declared, a friend came up to him, the day after his return, in the Oxford and Cambridge Club, and renewed the conversation which had been interrupted by his departure for India.

The name of that pleasant institution reminds me that during the years which immediately preceded the time of which I am now speaking, Maine was a faithful frequenter of the Cosmopolitan, then in its earliest youth, but which has never, I think, gathered a more agreeable company than it used to do in those days. It was, I believe, in the Sixties that one of its most assiduous votaries said to the writer:

'I have seen a good deal of Bohemia, and this is the pleasantest bit of Bohemia in Europe.'

In the spring of 1862, before Maine left for the East, he was elected a member of the Athenæum under a rule which permits nine persons of eminence to be added to that club every year by a vote of the committee, which must be unanimous. This was the first and by no means the least acceptable of many honours of the kind which, as we shall see later, fell to his lot.

When Maine arrived in India, Lord Elgin was Viceroy, but he died about a year afterwards, while on a journey in the Himalayas, and was succeeded by Sir William Denison, the Governor of Madras, who 'acted' till Sir John Lawrence arrived from England. Maine's period of office, prolonged by two years beyond its natural termination, covered the whole of Sir John Lawrence's Viceroyalty and extended for some way into that of Lord Mayo. With each of these eminent persons he got on extremely well, but his name is hardly mentioned in the 'Life of Lord Elgin' by the late Mr. Theodore Walrond or in that of Lord Lawrence by Mr. Bosworth Smith. In Sir William Hunter's 'Life of Lord Mayo' there is a very long letter, of eighty octavo pages, from Sir James Stephen to Sir W. Hunter, which, although it is mainly occupied with the course of Indian legislation after Maine returned to Europe, throws some light on his action as Law Member, and might be read with much advantage in connection with the second portion of this volume.

Like all sensible men in India, Maine was anxious, whenever he could, to support the man who had to bear the greatest weight of responsibility for all decisions, and he carried the same habit to the India Office, having as little of the *frondeur* in him as any man I have ever known. He confined himself, of course, chiefly to his own department, but took his fair share in matters relating to General Administration when it was right to do so.

He gave the Legislative Department its present shape, and during his tenure of office 209 Acts were passed. I copy (with some amendments, with which Mr. Stokes has kindly supplied me) the list of the principal ones, which was given by Sir William Hunter in a pamphlet published soon after Maine's departure from India.

1862–63

The Consolidated Customs Act.
The Merchant Seamen's Act.
The Act constituting Recorders' Courts in British Burma.

1863–64

The Whipping Act.
The Emigration Act.
The Registration of Assurances Act.

1864–65

The Common Carriers' Act.
The Forest Act.
The Law of Intestate and Testamentary Succession.
The Criminal Procedure High Courts Act.
The Parsi Marriage Act.
The Pleaders' and Mukhtiárs Act.
The Parsi Intestate Succession Act.

1865–66

The Bills of Exchange Act.
The Companies Act.
The Post Office Act.
The Partnership Act.
The Registration of Assurances Act.
The Remarriage of Native Converts Act.

1866-67

Mortgagees' and Trustees' Acts.
The Panjáb Murderous Outrages Act.
The Administrator-General's Act.
The Act for the regulation of Printing Presses and the Preservation of Books printed in India.
The Stamp Act.

1867–68

The Contagious Diseases Act.
Substitution of Stamps for Fees in High Courts, &c.
The Principal Sadr Amíns and Munsifs' Act.

1868–69

The Oudh Rent Law.
The Oudh Taluqdárs' Act.
The Panjáb Tenancy Act.
The Rural Police Act, N.W. Provinces.
The Divorce Act.
The Indian Articles of War.

It would be a mistake to infer from the large number of Acts which were passed in his time that Maine was a great adept in the art of drafting, like his friend and contemporary Lord Thring. That was not at all the bent of his genius. His power lay in seeing very quickly what ought to be done in the way of legislation, in finding out who were the proper men to assist him by their skill in manipulating details, in piloting his Bills through the ordeal of Select Committee (the most important phase in the genesis of an Indian Act), and finally in carrying it safe and sound through the Legislative Council. How admirably he set about this last portion of his work the speeches contained in this volume will very clearly show.

He had not been long reader at the Inns of Court when, as I well remember, his attention was attracted by the very intelligent questions put to him by one of the students who attended his private lectures. This gentleman was Mr. Whitley Stokes, who had been a pupil of Mr. (afterwards Lord) Cairns, Mr. Arthur Cayley, and the late Mr. Thomas Chitty, and who, after practising for a short time at the Chancery Bar, went out to Madras, remained there for two years, and obtained a high reputation. In the year 1864 Maine invited him, for the second time, to Calcutta, where he ultimately became Secretary to Government in the Legislative

Department and Maine's right-hand man in the drafting of all his Bills. At a considerably later period the proved ability of Mr. Stokes was duly recognised by his becoming himself Law Member of Council after that office had been held by Lord Hobhouse, and before it was filled by Mr. Ilbert. In a body like the Viceroy's Legislative Council there is less scope for skilful fence in debate than there is in larger assemblies, but I have been told that Maine showed no want of debating power if the 'occasion sudden' chanced to arise, a fact which is all the more creditable as he had but little opportunity of studying an art which to most men only becomes easy after long practice. When at Cambridge he was enrolled as a member of the very select and distinguished body commonly spoken of as 'the Apostles,' but I never heard of his taking any part in the discussions of the Union, which was not in his time an institution of such importance as it was in the days described by the first Lord Lytton, when—

> Every week that club-room famous then
> Where striplings settled questions spoilt by men,
> When grand Macaulay sat triumphant down,
> Heard Praed's reply, and long'd to halve the crown.

I never happened to ask Maine, as I did once ask Mr. Disraeli, whether he had belonged to debating societies. Possibly he might have given the same answer as did that great master of his weapon: 'No, perhaps it would have been better for me if I had—at least at the commencement of affairs.'

It follows from what I have said that a very good idea of Maine's legislative action can be derived from such a collection of speeches as are to be found in this volume, more especially when they have been selected and annotated by one who was in intimate relation with him during so large a part of his Indian career.

It must be remembered, however, that they are highly special, emphatically the speeches of the Law Member of the

Governor-General's Executive Council speaking in his Legislative Council. Every layman will judge them according to his knowledge of, or interest in, the subjects to which they relate, and I could do nothing more than call attention to such passages in them as have most struck me individually. So very great a majority of them relate to matters as to which the opinions of lawyers, and of the most enlightened kind of lawyers, alone are valuable, that it is by the judgment of such only that they must stand or fall.

That is not quite so with the Minutes. Most of them, no doubt, relate also to legal matters, but some others relate to the ordinary work of Indian government, and having had considerable experience of such documents, I think I may venture to pronounce not a few of these to be very good.

I may cite as specimens the Minute on the Ambeyla Campaign, that on the Study of Persian, that on the Decentralisation of Finance, the two very important State papers of February 27 and March 16, 1867, on the Bengal Legislative Council, those on the question of the Capital of India, the Migration to Simla, and other cognate subjects. Other examples are the Minutes on the Panjáb University, on the Salt Duty, on the 'Educational Service' as it was in 1864, and on Occupancy Rights in the Panjáb in 1866.

Maine's indirect influence, however, in things Indian was hardly less powerful than his direct influence. Some very weighty remarks of Sir Alfred Lyall's should be read in this connection. They appeared in the 'Law Quarterly Review' very shortly after the death of him who was their subject.

'His method, his writings, and his speeches at the Indian Council Board have had a strong and lasting effect upon all subsequent ways of examining and dealing with these subjects, whether in science or practical politics. He possessed an extraordinary power of appreciating unfamiliar facts and apparently irrational beliefs, of extracting their essence and

the principle of their vitality, of separating what still has life and use from what is harmful or obsolete, and of stating the result of the whole operation in some clear and convincing sentence.

'In a very sympathetic notice of Sir Henry Maine, which appeared in the "Saturday Review," it is mentioned that he could read a thick volume in such a way as to appropriate what concerned him in it, while an ordinary man read a hundred pages. In just such a swift and penetrating spirit he seems to have read India, the sacred literature, the ponderous histories, the innumerable volumes of official records, and the heavy bundles of papers that came before him as a member of the Government. He could throw a succession of rapid glances over its diversified social and political formation; and his remarkably accurate apprehension of its salient features commanded the admiration of all who knew the difficulty of such intellectual exploits. The local expert who, after years of labour in the field of observation, found himself with certain indefinite impressions of the meaning or outcome of his collected facts, often found the whole issue of the inquiry exactly and conclusively stated in one of Maine's lucid generalisations. Or else a suggestion thrown out, or a line of research indicated, would set the explorer on the right course, and show the real scope of the induction. And while he thus cast into orderly form a jumble of facts, or pointed with his divining rod to the sources of discovery, he never made the mistake of employing the incoherent, changeable and inconsistent notions of primitive people to build up clear-cut positive theories. To such theories, which are epidemic in India, he invariably applied the tests of actual evidence and comparative experience; he gave to fictions their proper place and value; and by detaching what was fit to survive from what had lost its reason of existence, he did much towards reconstructing the whole history of early Indian institutions on the basis most favourable for preserving their modified continuity.

'The problem that has been for the last thirty years before the English Government of India is the adjustment of the mechanism of a modern State to the habits and feelings of a vast mixed multitude in various stages of what we have

decided to call Progress. In such a period of unusually rapid transition Maine's instinct of discernment and skill in adaptation were most valuable. A great quantity of writing about India, and much of what has been done in India, is necessarily founded upon guess-work and half-knowledge, which accounts for much hazardous speculation in the departments of thought and action. Moreover, the Oriental contempt of qualified statements and of limitations, whether in time or space, is apt to be contagious among all who have to do with Eastern law or literature; local characteristics are treated as universal; castes and creeds as immutable; the scanty data massed in this fashion are piled up into wide and lofty inductions. Sir Henry Maine's large and accurate intelligence enabled him to detect and point out these snares and delusions, which have more or less encompassed all previous English writers and politicians in their treatment of peculiarly Indian questions. To pass over earlier examples, I may suggest that if anyone desires to measure, in literature, the difference between the generalisations of a man of literary talent and a man of genius, he should set Buckle's well-known demonstrations regarding Indian society and religions side by side with Maine's conclusions on the same matters; conclusions so cautiously stated, yet so full of life and fecundity. The former writer went wrong in premisses and process, in his facts and his inferences; the latter makes each fact ring true before he passes it, analyses and classifies, draws his analogies with the prudence of Bishop Butler, and finally sets out the real import of the phenomenon under scrutiny in a manner that gives a firm foothold for further advance. A certain number of passages might be cited from his works that have, perhaps, done more to arrange and extend our ideas upon the past and present constitution of Indian societies than anything elsewhere written on the subject.'

Before Maine had been very long in India he was appointed Vice-Chancellor of the University of Calcutta, and he delivered in that capacity four addresses to the graduates which were not surpassed by anything he ever wrote. The first three were published in the second edition of his 'Village Com-

munities;' the fourth was not published because, I suppose, a good deal of it was used up by himself in subsequent compositions, as, for instance, in his Rede lecture, to be mentioned farther down, which contains probably the most often quoted phrase of which he was the author:

'Except the blind forces of Nature, nothing moves in this world which is not Greek in its origin.'

That originally formed part of the unpublished address.

In December 1868, I became Under-Secretary of State for India, and for the next few months my correspondence with Maine was naturally pretty brisk. His letters, however, dealt almost exclusively with current business, discussing the details of such measures as the Government of India Bill, of which I had charge in the House of Commons, explaining the differences between himself and the Indian Law Commission, with numerous other matters, very important to us both at the time, but now as dead as the Pharaohs. I have looked through the whole file without finding anything that could be published with advantage to any creature, unless indeed it be a single paragraph—to be taken, no doubt, *cum grano salis*—in which he recounts the fate of a Bengali schoolmaster who was sent to take charge of a school in the Garo hills. The experiment, as might have been expected, was not brilliantly successful, for his pupils barred him out the first day, and ate him the second.

Members of the Viceroy's Council and of the councils of the Governors of Madras and Bombay are for the most part officials who have risen through the various ranks of Anglo-Indian society, and who keep establishments large in proportion to their emoluments. Maine could not conveniently have followed this example, for his wife's health prevented her accompanying him to India, and he could not without infinite trouble have managed the sort of household which a man in his high position usually has in that country.

He lived, accordingly, the life of a bachelor; but of a very hospitable member of that brotherhood. His breakfasts, over which a lady whose many gifts have made her well known in London, as of old in Calcutta society, usually presided, were especially famous.

He never cared much for society, commonly so called, at any time or in any country; but in India he had, of course, the opportunity of picking the brains of a great many exceedingly able men, from Sir John Lawrence downwards, and of their conversation the works which he published after his return to Europe bear constant traces.

To some persons, transplanted suddenly from what Dr. Parr called the 'plena lux Londinensis' to our great Asiatic dependency, the perpetual strangeness of all that surrounds them, the forms and colours, the glory of the vegetation, the interest of the animal life, are compensations for a great deal they leave behind; but this was not the case with Maine. He cared as little for external nature as anyone I have ever known. He would not, indeed, have gone quite so far as did his financial colleague, Mr. Massey, who, he declared, once replied to a lady in Calcutta, who said, 'But surely, at least the flowers in India give you pleasure?' 'No, they don't: they are the only things in the country which do not smell.' A more unjust slander upon countless meritorious vegetables which fill a well-kept Indian garden, or are to be found growing wild by those who care to open their eyes or their nostrils, was never uttered. Maine would not have slandered them, but I fear they added little to the happiness of his life.

He ended his Indian career with all the honours. The Viceroy moved, and his colleagues unanimously passed, the following resolution:—

'This Council, entertaining a high sense of the conspicuous ability displayed by Mr. H. S. Maine, during the time that he held office as Law Member of the Council of the Governor-

General, hereby expresses to him its cordial thanks for his long, faithful, and valuable service, its deep regret at his departure, and hearty wishes for his future welfare and happiness.'

In bringing it forward, Lord Mayo observed, *inter alia*, with reference to Maine's services to education :—

'In all the discussions that took place during his tenure of office on that interesting and all-important question, his opinions, delivered with great authority and weight, were esteemed and valued by all classes in this country; and his eloquent addresses during the three years that he filled the office of Vice-Chancellor of the Calcutta University are not among the least of his public services, and will long be remembered by the youths of Bengal.

'But it was not only as a legislator and a philanthropist that Mr. Maine was enabled to perform great service to the State. In the Executive Council of the Empire he was always found a wise councillor, an impartial adviser, and a minister of originality, sagacity, and resource.

'In common with the rest of his colleagues, I deeply deplore his loss, for I always found him ready to labour on any subject or in any matters, even though not directly connected with his department, in which his assistance was required; and I am sure my colleagues will agree with me that his genial temper, his deference to the opinions of others, his modesty and forbearance, and the interesting way in which he always advanced or elucidated his opinions, made a discussion with him on difficult and important matters as agreeable as it was instructive.

'He has departed from among us, but we may hope that, as he is still young and strong, so much knowledge and so much experience will not be lost to India. He never informed me of his intentions as to his future career. I know little of his aspirations or of his wishes. It is quite possible that, after so many years of labour in this climate, he may naturally wish for comparative repose. But I am sure I only express the unanimous opinion of this Council in saying that, whether it be in the Senate, the Council, or on the Judicial Bench at Home, the Indian public will still hope for a continuance of

those services from which it has already so much benefited ; and we may be sure that, whatever sphere he may select for active exertion, the influence of his great experience, learning, and eloquence will be strongly felt and will ever be exercised for good.

'Gentlemen, I am aware how inadequate are the terms in which I have endeavoured to recommend this resolution to your consideration, and that what I have said is hardly worthy of the conspicuous public services I have endeavoured to describe. I feel that anything that may be spoken of him to-day will add little to his character or to his fame ; but we may be content to know that the best and most lasting records of his long and able service will be found in those wise laws which, under his auspices, were placed on our statute book, in the eloquent addresses delivered in this Chamber—which, by the happy intervention of the press, have been preserved and given to the public—and in those numerous and able documents which have issued from his pen, and which now comprise so valuable a portion of Indian political literature.'

Mr. Cowie bore testimony to the great value of the mercantile legislation that had been passed during Maine's tenure of office, enumerating the consolidation of the law as to Sea Customs, the Act defining the rights and liabilities of Common Carriers, the Companies Act, the General Stamp Act, and various Acts relating to Bills of Exchange, Policies of Insurance, &c.

In the course of a speech of considerable length Sir John Strachey said :—

'Although, my lord, I cannot now attempt to detail the many claims which Mr. Maine possesses to our grateful and admiring recollection, there is one other branch of his public services in India to which your Excellency has referred, and which I must briefly notice—the services which he performed as Vice-Chancellor of the Calcutta University. That the author of "Ancient Law" was no less eminent for his literary acquirements and ability than for his knowledge as a jurist it

is hardly necessary for me to say, and his scholastic experience, his learning, and his broad and sound views as to the true objects and scope of study will, I am convinced, be found to have produced a lasting effect on the progress of education in this country. The key-note of those brilliant addresses to the Calcutta University which signalised Mr. Maine's tenure of office was this: That the object of all study is to attain a knowledge of the truth; that truth, whether in relation to the external world and its phenomena, or to human nature and society, and the feelings and influences under which they act, must conform to the same general conditions; and that the teaching of all true science, to whatever it be applied, is (to use Mr. Maine's own words) "continuous sequence, inflexible order, and eternal law." He warned us in eloquent language that the genuineness of knowledge is the one essential consideration, and that the merely literary form in which knowledge is conveyed is, in itself, a small matter. Never, he maintained, under any guise of Oriental culture or otherwise, must we teach that which is not true. Attention to these fundamental principles has nowhere been more required than in India, and at no time is it more required than at present. By no one have these principles been more clearly or more forcibly enunciated than by Mr. Maine, and it will be well for the cause of education in India if we follow his weighty counsels.

'But, my lord, while we regret Mr. Maine's departure, we may, I think, have the satisfaction of feeling that his career, unlike that of many of the distinguished men who leave India, is not closed. England is at last beginning to recognise the evils of her shapeless legal system, and to see the necessity of digesting, and ultimately of codifying, that enormous mass of statutes, precedents, dicta and rules of practice which constitute the bulk of her law. In helping on this work, Mr. Maine's learning and experience would be especially valuable.

'There are other ways in which he may render services perhaps still more useful to his science, to England, and to India.

'In his "Ancient Law" Mr. Maine has shown that the inductive method is the only way to attain clear notions as

to the origin of those elementary legal conceptions which are incorporated into our social system; and the primeval institutions and customs of India which have been handed down, almost unchanged, to the present generation—such as the village community, the undivided family, the practice of adoption taking the place of testation—furnished him with admirable subjects for the application of that method. The extended knowledge and experience which Mr. Maine's residence in India has given him will enable him to pursue with increased power his scientific researches, and we may hope that he will be able, from the chair which he is expected to fill at Oxford, to impart to the youth of England, not only correct principles of jurisprudence, but to extend that intelligent and unselfish interest which the best minds in England are beginning to take in this country and its history and institutions, and to diminish the contempt and dislike which, as between nations, are almost always due to ignorance alone. We may hope, too, that Mr. Maine's teaching may have a yet wider range; that the beneficial influence of his scientific and philosophical mind may extend beyond questions affecting the conditions of any single human society, or the relations of two countries such as England and India, and may reach that almost unbroken field of International Law to which he has already given so much of his attention. If there be any man able to fix the true principles of this most important of all branches of jurisprudence, that man is Mr. Maine.

'It would be a worthy conclusion to his labours to lay the foundations[1] for that complete respect for the authority of such law which Whewell reckoned among the most hopeful avenues to that noble ideal, a perpetual peace; "the most hopeful," he says, "because along this avenue we can already see a long historical progress, as well as a great moral aim."'

Major-General the Honourable Sir Henry Durand said that—

'In the spirit of the resolution before the Council, he

[1] How strangely this aspiration was fulfilled we shall see on a later page of this memoir.

wished to say a few words on a point which was adverted to by the Honourable Mr. Strachey, and which might not be well known by the public—in fact could not be well known—namely, the great use of which Mr. Maine had been during the administrations of Lord Elgin and Sir John Lawrence; and his Excellency the President knew best, in connection with his own administration, the immense service which Mr. Maine's opinions were in that particular department which is called International Law. Questions of International Law in this country did not come before us in that simplicity of form in which they came before European nations of co-equal powers and rights. His Excellency was quite aware how nice and delicate were the points of such law which arose here between the dependent States of this Empire and the supreme authority. Sir Henry Durand could not enter into any detail by way of exemplification; the cases were so numerous that it would be difficult to select an example. Yet he might say that Mr. Maine was ever ready at all times to give the fullest consideration and the best advice with reference to these questions. He felt that it was due to Mr. Maine to say that he was something more, and in fact a great deal more, than an ordinary jurist. As a jurisconsult having to deal with the most complicated and difficult questions, there was no man more fitted than Mr. Maine to solve the problems of International Law which constantly came up for decision under the administrations during which Mr. Maine was a member of the Government; and the obligation of the Government to Mr. Maine on account of the part he had taken in that large and anomalous class of questions was really almost beyond calculation.'

Maine returned from India in 1869 looking twice the man he was seven years before, and soon fell back into his old life with his family and friends. It was not long, however, that he was allowed a perfect holiday, for he was soon offered the Corpus Professorship of Jurisprudence which had just been founded at Oxford. It was there that he delivered the six lectures which were published in 1871 under the title of 'Village Communities.' He took me down to be present at

one of these lectures, anxious, I think, to hear from an old pupil who had, as he knew, been one of the warmest admirers of those he had given many years before at the Middle Temple, whether India had abated any of his vigour. I could most conscientiously say that it had not. His voice was as strong, his sentences as clear-cut, and the arrangement of his material quite as good as ever.

He did not originally intend to publish these lectures by themselves, but it appeared to some of his audience that they would be useful to persons who were engaged in somewhat similar studies based upon the investigations of certain German scholars who were then beginning to be read in England, more especially Nasse and G. L. von Maurer. In the third and fifth lectures, the conclusions of these writers are briefly summarised. His Indian data were drawn partly from the store of facts which he had gradually accumulated while he was dealing practically with the actual wants of India as a legislator, and partly from the conversation of Lord Lawrence, an admirable authority on all that related to Native usage in the districts in which he had spent the first half of his long and brilliant career. Maine had further the advantage of being allowed to submit his conclusions on all that related to India to Sir George Campbell, who was at that time Lieutenant-Governor of Bengal, and whose failure in a career for which he was pre-eminently unfitted—that of a private member of the House of Commons—should not blind his countrymen to the truth that he was possessed of great knowledge and remarkable administrative capacity. Whatever he had to say about India—and he wrote a great deal about it at different periods of his career—was always worth considering, and, oftener than not, exceedingly valuable.

Appearing, as Maine's new venture did, soon after the long controversy which ended in Mr. Gladstone's first Irish Land Bill was brought to a conclusion—speedily, alas! to be

overthrown—it attracted a good deal of attention even beyond Indian circles or professed students of agrarian law, and a distinguished lawyer, who is happily still among us, gave the name of Maine's Village Community to Cornwall Gardens and its neighbourhood, which was an orchard when he was preparing to go to India, but was covered with houses when he returned to this country, and was inhabited by half the people who were then controlling the Government of our Eastern Empire. Now I suppose the book has fewer readers, but it is full of observations which appeal to all intelligent men, however little direct interest they may have in India.

Here is a specimen:

'When, in truth, we have to some extent succeeded in freeing ourselves from that limited conception of the world and mankind, beyond which the most civilised societies and (I will add) some of the greatest thinkers do not always rise; when we gain something like an adequate idea of the vastness and variety of the phenomena of human society; when in particular we have learned not to exclude from our view of the earth and man those great and unexplored regions which we vaguely term the East; we find it to be not wholly a conceit or a paradox to say that the distinction between the present and the past disappears. Sometimes the past is the present; much more often it is removed from it by varying distances, which, however, cannot be estimated or expressed chronologically. Direct observation comes thus to the aid of historical inquiry, and historical inquiry to the help of direct observation.'

Here is another:

'Every man is under a temptation to overrate the importance of the subjects which have more than others occupied his own mind, but it certainly seems to me that two kinds of knowledge are indispensable, if the study of historical and philosophical jurisprudence is to be carried very far in England; knowledge of India and knowledge of Roman Law

—of India, because it is the great repository of verifiable phenomena of ancient usage and ancient juridical thought; of Roman Law, because, viewed in the whole course of its development, it connects these ancient usages and this ancient juridical thought with the legal ideas of our own day. Roman Law has not, perhaps, as evil a reputation as it had ten or fifteen years ago, but proof in abundance that India is regarded as supremely uninteresting is furnished by parliament, the press, and popular literature. Yet ignorance of India is more discreditable to Englishmen than ignorance of Roman Law, and it is at the same time more unintelligible in them. It is more discreditable, because it requires no very intimate acquaintance with contemporary foreign opinion to recognise the abiding truth of De Tocqueville's remark that the conquest and government of India are really *the* achievements in the history of a people which it is the fashion abroad to consider unromantic. The ignorance is moreover unintelligible, because knowledge on the subject is extremely plentiful and extremely accessible, since English society is full of men who have made it the study of a life pursued with an ardour of public spirit which would be exceptional even in the field of British domestic politics. The explanation is not, however, I think, far to seek. Indian knowledge and experience are represented in this country by men who go to India all but in boyhood, and return from it in the maturity of years. The language of administration and government in India is English, but through long employment upon administrative subjects a technical language has been created, which contains far more novel and special terms than those who use it are commonly aware. Even, therefore, if the great Indian authorities who live among us were in perfect mental contact with the rest of the community, they could only communicate their ideas through an imperfect medium. But it may be even doubted whether this mental contact exists. The men of whom I have spoken certainly underrate the ignorance of India which prevails in England on elementary points. If I could suppose myself to have an auditor of Indian experience, I should make him no apology for speaking on matters which would appear to him too elementary to deserve discussion;

since my conviction is that what is wanting to unveil the stores of interest contained in India is, first, some degree of sympathy with an ignorance which very few felicitous efforts have yet been made to dispel, and, next, the employment of phraseology not too highly specialised.'

In 1871 Maine published in the 'Cornhill Magazine' a very excellent review of Mr. (now Sir) William Hunter's work on our 'Indian Mussulmans.' It dealt with the Wahábí movement, then very interesting, and concludes with a story which he was fond of repeating:

'No book,' he observes, 'illustrates more vividly than that before us the difficulties of that most extraordinary of experiments, the British Empire in India. So far as they here appear, they may be summed up in the remark that the Anglo-Indian Government is bound, by the moral conditions of its existence, to apply the modern principle of equality, in all its various forms, to the people of India—equality between religions, equality between races, equality between individuals, in the eye of the law. But it has to make this application among a collection of men (a community they can hardly be called) to whom the very idea of equality is unknown or hateful. All Mahometans are, indeed, equal theoretically among themselves, but their equality has for its indispensable basis the absolute subjection of everybody else. What Hindus think of equality among men will best be gathered from an anecdote. A Bráhman lawyer in great practice was a year or two seeking to establish himself in the good graces of an Anglo-Indian functionary by enlarging on the value of Bentham's philosophy, in so far as it placed the standard of law and morals in the greatest happiness of the greatest number. The Englishman expressed some surprise that the principle should be so much applauded in a country like India. "No doubt," rejoined the high-caste Hindu, after a glance round the room to assure himself that nobody was within earshot, "no doubt it is one difficulty that, according to my religion, a Bráhman is entitled to exactly five-and-twenty times as much happiness as anybody else!"'

In May 1871, Maine was gazetted a K.C.S.I., and in the November of the same year the Duke of Argyll offered him a seat on the Council of the Secretary of State for India.

He naturally took most interest in the judicial department of the India Office, and soon made himself a power in all that related to it. He did not speak much in Council, though when he did he was at least as effective as any other member of that body. Among the oldest of his colleagues there were at that time some men of great ability, such as Sir Frederick Halliday, whose powers even when he retired years after the period of which I am writing, at the age of eighty, would have justified his sitting in any Council or Cabinet of the world; but there were others who were far past their best, and who tried to persuade themselves by too frequent speaking that their minds were as active as ever. An able man, accordingly, who spoke rarely and always voted right, was a great treasure.

Maine, Mallet, and Frere were the three councillors who took the most sustained interest in the parliamentary side of Indian affairs while the Duke of Argyll continued Secretary of State—that is, from December 1868 to the spring of 1874.

The work of the Indian Council, which is essentially a revising not an originating body, rarely comes before the public in this country, or would be read by one in half a million if it did, and the work done by its individual members is seldom identified even in India; but in 1876 a discussion on the selection and training of candidates for the Indian Civil Service was laid before Parliament. In it was included a Minute by Sir Henry Maine, which is understood to have had considerable effect on the minds of those who then said the last word in Indian affairs, and might be quoted as a good example of his later official style. As, however, it is easily accessible, I prefer to quote another which it is difficult, not to say practicably impossible, to procure, and which will accordingly be found in its place lower down.

The question about the training of Civil Servants, settled for a time in 1876, has been reopened, rediscussed, and once more settled in a different manner; but this is not the place to discuss it.

In 1875 Sir Henry Maine brought out his book on the 'Early History of Institutions.' It comprised thirteen lectures, which had, like all those contained in the first edition of his 'Village Communities,' been delivered at Oxford. A large portion of them is occupied with the new materials for legal and social history which had been then recently published in translations of ancient Irish or Brehon law treatises, while some unpublished translations of Brehon manuscripts, to which the lecturer had access, were also freely used. The work may be considered as a sort of continuation of 'Ancient Law.' It is probable that it will never find as many to study it as does that book, but it is nevertheless full of matter which will be thought valuable by some who would not be specially attracted by the curious light it throws upon the resemblances between primitive Aryan institutions as studied on the banks of the Ganges and on those of the Shannon.

Anyone who reads the following passage from Lecture X. will understand the nature of this light. Sir Henry is speaking of the law of distress, which fills a very large part of the ancient Irish treatise known as 'Senchas Mór.'

'"Notice precedes every distress in the case of the inferior grades, except it be by persons of distinction or upon persons of distinction. Fasting precedes distress in their case. He who does not give a pledge to fasting is an evader of all; he who disregards all things shall not be paid by God or man."

'Mr. Whitley Stokes was the first, I believe, to point out that the institution here referred to was identical with a practice diffused over the whole East, and called by the Hindús "sitting dharná." I will presently read you a passage in which the proceeding is described as it was found in India before the British Government, which has always regarded it

as an abuse, had gone far in its efforts to suppress it. But perhaps the most striking examples of the ancient custom are to be found at this day in Persia, where (I am told) a man, intending to enforce payment of a demand by fasting, begins by sowing some barley at his debtor's door and sitting down in the middle. The symbolism is plain enough. The creditor means that he will stay where he is without food, either until he is paid or until the barley-seed grows up and gives him bread to eat.

'Lord Teignmouth has left us a description (in Forbes's "Oriental Memoirs") of the form which the "watching constantly at the door" had assumed in British India before the end of the last century. The inviolability of the Bráhman is a fixed principle with the Hindús, and to deprive him of life, either by direct violence or by causing his death in any mode, is a crime which admits of no expiation. To this principle may be traced the practice called dhárná, which may be translated caption or arrest. It is used by the Bráhmans to gain a point which cannot be accomplished by any other means, and the process is as follows: The Bráhman who adopts this expedient for the purpose mentioned proceeds to the door or house of the person against whom it is directed, or wherever he may most conveniently arrest him; he then sits down in dharná with poison or a poniard or some other instrument of suicide in his hand, and threatening to use it if his adversary should attempt to molest or pass him he thus completely arrests him. In this situation the Bráhman fasts, and by the rigour of the etiquette the unfortunate object of his arrest ought to fast also, and thus they both remain till the institutor of the dharná obtains satisfaction. In this, as he seldom makes the attempt without the resolution to persevere, he rarely fails; for if the party thus arrested were to suffer the Bráhman sitting in dharná to perish by hunger, the sin would for ever lie upon his head. This practice has been less frequent of late years, since the institution of the Court of Justice at Benares in 1793; but the interference of the Court and even of the Resident has occasionally proved insufficient to check it.'[1]

[1] It is now punishable under the Indian Penal Code, sec. 508.

But although the light thrown mutually by early Irish institutions upon Indian institutions and *vice versâ* is the principal subject of the lectures, all sorts of sidelights are made to shine upon many subjects more generally interesting to English readers. I find, for example, very early in the second lecture this passage referring to Cæsar's account of the Druids.

'The prefaces in Irish found at the commencement of some of the law tracts, which are of much interest but of uncertain origin and date, contain several references to the order in Celtic society which has hitherto occupied men's thoughts more than any other, the Druids. The word occurs in the Irish text. The writers of the prefaces seem to have conceived the Druids as a class of heathen priests who had once practised magical arts. The enchanters of Pharaoh are, for instance, called the Egyptian Druids, in the preface to the "Senchas Mór." The point of view seems to be the one familiar enough to us in modern literature, where an exclusive prominence is given to the priestly character of the Druids; nor do the Brehon lawyers appear to connect themselves with a class of men whom they regard as having belonged altogether to the old order of the world. I am quite aware that, in asking whether the historical disconnection of the Brehons and the Druids can be accepted as a fact, I suggest an inquiry about which there hangs a certain air of absurdity. There has been so much wild speculation and assertion about Druids and Druidical antiquities that the whole subject seems to be considered as almost beyond the pale of serious discussion. Yet we are not at liberty to forget that the first great observer of Celtic manners describes the Celts of the continent as before all things remarkable for the literary class which their society included. Let me add that in Cæsar's account of the Druids there is not a word which does not appear to me perfectly credible. The same remark may be made of Strabo. But the source of at all events a part of the absurdities which have clustered round the subject I take to be the Natural History of Pliny, and they seem to belong to those stories about plants and animals to which

may be traced a great deal of the nonsense written in the world.

'You may remember the picture given by Cæsar of the continental Celts, as they appeared to him when he first used his unrivalled opportunities of examining them. He tells us that their tribal societies consisted substantially of three orders, two privileged and one unprivileged, and these orders he calls the Equites, the Druids, and the Plebeians. Somebody has said that this would be a not very inaccurate description of French society just before the first revolution, with its three orders of nobles, clergy and unprivileged *tiers état*; but the observation is a good deal more ingenious than true. We are now able to compare Cæsar's account of the Gauls with the evidence concerning a Celtic community which the Brehon tracts supply; and if we use this evidence as a test, we shall soon make up our minds that, though his representation is accurate as far as it goes, it errs in omission of detail. The equites, or chiefs, though to some extent they were a class apart, did not stand in such close relation to one another as they stood to the various septs or groups over which they presided. "Every chief," says the Brehon law, "rules over his land, whether it be small or whether it be large." The Plebeians, again, so far from constituting a great miscellaneous multitude, were distributed into every sort of natural group, based ultimately upon the family. The mistake, so far as there was error, I conceive to have been an effect of mental distance. It had the imperfections of the view obtained by looking on the Gangetic plains from the slopes of the Himalayas. The impression made is not incorrect, but an immensity of detail is lost to the observer, and a surface varied by countless small elevations looks perfectly flat. Cæsar's failure to note the natural divisions of the Celtic tribesmen, the families, and septs or sub-tribes is to me particularly instructive. The theory of human equality is of Roman origin; the comminution of human society, and the unchecked competition among its members, which have gone so far in the Western Europe of our days, had their most efficient causes in the mechanism of the Roman State. Hence Cæsar's omissions seem to be those most natural in a Roman general

who was also a great administrator and trained lawyer; and they are undoubtedly those to which an English ruler of India is most liable at this moment. It is often said that it takes two or three years before a Governor-General learns that the vast Indian population is an aggregate of natural groups, and not the mixed multitude he left at home; and some rulers of India have been accused of never having mastered the lesson at all.'

Again, in the same lecture, we have the following:—

'Nowhere else in the world [the writer is speaking of England] is there the same respect for a fact, unless the respect be of English origin. The feeling is not shared by our European contemporaries, and was not shared by our remote ancestors. It has been said—and the remark seems to me a very just one—that in early times questions of fact are regarded as the simplest of all questions. Such tests of truth as ordeal and compurgation satisfy men's minds completely and easily, and the only difficulty recognised is the discovery of the legal tradition and its application to the results of the test. Up to a certain point, no doubt, our own mechanism for the determination of a fact is also a mere artifice. We take as our criterion of truth the unanimous opinion of twelve men, on statements made before them. But then the mode of convincing, or attempting to convince them is exactly that which would have to be followed if it were sought to obtain a decision upon evidence from the very highest human intelligence. The old procedure was sometimes wholly senseless, sometimes only distantly rational; the modern English procedure is at most imperfect, and some of its imperfection arises from the very constitution of human nature and human society. I quite concur, therefore, in the ordinary professional opinion that its view of facts and its modes of ascertaining them are the great glory of English law. I am afraid, however, that facts must always be the despair of the law-reformer. Bentham seems to me from several expressions to have supposed that if the English law of evidence were reconstructed on his principles, questions of fact would cease to present any serious difficulty. Almost

every one of his suggestions has been adopted by the legislature, and yet inquiries into facts become more protracted and complex than ever. The truth is that the facts of human nature, with which courts of justice have chiefly to deal, are far obscurer and more intricately involved than the facts of physical nature; and the difficulty of ascertaining them with precision constantly increases in our age, through the ever-growing miscellaneousness of all modern communities, and through the ever-quickening play of modern social movements. Possibly we may see English law take the form which Bentham hoped for and laboured for; every successive year brings us in some slight degree nearer to this achievement; and consequently, little as we may agree in his opinion that all questions of *law* are the effect of some judicial delusion or legal abuse, we may reasonably expect them to become less frequent and easier of solution. But neither facts nor the modes of ascertaining them tend in the least to simplify themselves, and in no conceivable state of society will courts of justice enjoy perpetual vacation.'

Such passages, of interest to all educated men, might be cited from every one of the lectures.

The sixth, on 'The Chief and the Land,' is perhaps the one in the whole volume which is likely to have the largest number of readers outside the rank of professed students of jurisprudence, while the last four lectures will be mainly valuable to the latter class. There is not one, however, from the perusal of which any intelligent man will rise without having learned something he will wish to remember, or without obtaining new material for thought.

In the year 1876, a third edition of 'Village Communities' was called for, and to this the publisher added a number of detached essays. One of these was the paper on 'Roman Law and Legal Education' already alluded to; another was the Rede lecture 'On the Effects of Observation of India on Modern European Thought,' which was delivered in the year 1875. It is in this that occurs the saying which I have already alluded to as having been so often quoted:—

'Except the blind forces of Nature, nothing moves in this world which is not Greek in its origin.'

In the same volume are printed three addresses to the University of Calcutta, already mentioned as being among the very best of Sir Henry's compositions; a review of his friend and successor Sir James Stephen's 'Introduction to the Indian Evidence Act,' and several papers of minor importance.

In 1877 a great change took place in the life of the subject of this sketch. The Master of Trinity Hall died, and Sir Henry was chosen to be his successor. This gave him a dignified position and a pleasant occasional home at Cambridge, without burdening him with duties sufficiently serious to interfere with his work as a Member of the Council of India, work which, I may say in passing, is very far indeed from being so light as I have often found people interested in India, but unacquainted with the huge machine which connects our benevolent despotism in Asia with our parliamentary system at home, often imagine it to be.

His renewed connection with Cambridge made it natural for him to resign his Oxford Professorship. This he did in 1878, finding a thoroughly worthy successor in Sir Frederick Pollock, who a decade later paid, with full knowledge, a most graceful tribute to the work of his illustrious predecessor.

'Maine,' he said, 'can no more become obsolete through the industry and ingenuity of modern scholars than Montesquieu could be made obsolete by the legislation of Napoleon. Facts will be corrected, the order and proportion of ideas will vary, new difficulties will call for new ways of solution, useful knowledge will serve its turn and be forgotten; but in all true genius, perhaps, there is a touch of Art; Maine's genius was not only touched with Art, but eminently artistic; and Art is immortal.'

Honours now fell thickly upon the subject of this sketch. In 1877, he was elected a member of 'The Club.' On the last day of December, 1881, he became corresponding member of

the Institut in the Académie des Sciences Morales et Politiques, and in April 1883 was made foreign member of the same in the room of Emerson. I think the American Academy was the first learned body abroad which recognised the merit of the great English jurist. It made him a member while he was still in India, in November 1866. The Dutch Institute followed suit about ten years later. Then in 1877 came the Accademia dei Lincei, and in 1878 the Madrid Academy. The Royal Irish Academy followed in 1882, the Washington Anthropological Society in 1883, and the Juridical Society of Moscow in 1884.

All these distinctions, as well as the membership of the Royal Society, he gratefully accepted; while he wisely declined, at various periods of his career, the Chief Justiceship of Bengal, the permanent Under-Secretaryship for the Home Department, the permanent Under-Secretaryship for Foreign Affairs, and the Principal Clerkship in the House of Commons, vacated by the transformation of Sir T. Erskine May into Lord Farnborough. For all these positions his health absolutely unfitted him, while the third, besides entailing almost immediate death, would have brought him amidst a kind of work of which he knew nothing whatever, into the sharpest contrast with the greatest master of Parliamentary practice who has ever lived.

In the year 1879 the Indian Government asked Maine's opinion about the progress of codification in India, and he replied by the following Minute :—

'I am highly sensible of the honour which the Government of India confers on me in asking my opinion on various questions relating to the progress of Indian codification, but I have felt from the first that my connection with the Home Government would much diminish my power of giving assistance to the Law Commissioners lately appointed. I have concurred in the several despatches which have been addressed by the Secretary of State to the Governor-General in

Council on the subject of codification, and these despatches apply to almost all the points on which I am now requested to state my views. I cannot again conveniently follow Mr. Justice Stephen in his criticism on the details of the Bills of which copies have reached this country, since these measures, when they leave the hands of the able and experienced men who constitute the Law Commission,[1] will probably be transmitted to the Secretary of State for an official opinion, and I am disinclined to form my own judgment on their contents before the last words of the Commissioners are known to us.

'The Secretary of State, in his despatch of August 9, 1877, stated in general language his acquiescence in the course of procedure which the Government of India proposed to follow in regard to codification. For myself, I felt too much interest in the continuance of the process to have any wish for interrupting it by objections to order and arrangement, and I was conscious that the transfer to India of the initiative in codifying Bills made it necessary to give wide scope to the ideas of the Law Member of Council for the time being. But there is not much impropriety in my acknowledging that I have never been convinced by the arguments of the Government of India for postponing the law of tort (or civil wrong), which were first given in the despatch of July 5, 1875, and were not recalled by that of May 10, 1877. The absence of a measure on the subject is the great gap in the body of Indian codified law, and one hardly understands the spirit in which a system of the kind could be framed, with a law of contract enacted but a law of tort omitted, and, to all appearance, indefinitely postponed. I am not in any way satisfied by the reasoning of paragraph eight of the despatch first above quoted, which indeed appears to contradict much of that advanced in the remaining paragraphs of this document. It contends that rights have not become sufficiently settled in India to afford a basis for a codified law of wrongs. But the frank statement of the difficulties of codification which fills much of the despatch, and which almost amounts to a general argument against codification itself, seems to be founded on the assumption that India is full of indigenous legal or customary

[1] Mr. Whitley Stokes, Sir Charles Turner, and Mr. (now Sir Raymond) West.

rules which suffice for the solution of all questions, and that the great danger of codification is, that through the necessary conditions of the process these rules may be changed. I believe the former view to be much truer than the latter. Nobody who has inquired into the matter can doubt that, before the British Government began to legislate, India was, regard being had to its moral and material needs, a country singularly empty of law. I think it therefore very possible, and even certain, that there are not in India indigenous rules to guide the courts of justice when questions of civil wrong are brought before them. But what is the consequence? Civil wrongs are suffered every day in India, and though men's ideas on the quantity of injury they have received may be vague, they are quite sufficiently conscious of being wronged somehow to invite the jurisdiction of courts of justice. The result is that, if the legislature does not legislate, the courts of justice will have to legislate; for, indeed, legislation is a process which perpetually goes on through some organ or another wherever there is a civilised Government, and which cannot be stopped. But legislation by Indian judges has all the drawbacks of judicial legislation elsewhere, and a great many more. As in other countries, it is legislation by a legislature which, from the nature of the case, is debarred from steadily keeping in view the standard of general expediency. As in other countries, it is haphazard, inordinately dilatory, and inordinately expensive, the cost of it falling almost exclusively on the litigants. But in India judicial legislation is, besides, in the long run, legislation by foreigners, who are under the thraldom of precedents and analogies belonging to a foreign law, developed thousands of miles away, under a different climate and for a different civilisation. I look with dismay, therefore, on the indefinite postponement of a codified law of tort for India.

'The only other point on which I think I can offer an opinion with propriety at the present moment is the general character of the Transfer of Property Bill. I am well aware that the precedence given to this measure is in part attributable to the circumstance that a draft law on the subject was sent to India by the Indian Law Commissioners, and, indeed,

I long ago considered myself that some measure of the kind was greatly needed for Bengal Proper. I will add that the present Bill seems to me an extremely well executed simplification of the corresponding branches of English law. But the question is, whether it is desirable in the Indian measure to follow the general lines of this English law. The system of the Bill is a system of private transfer applied to immovable property. But the system of the whole civilised world, except England and the countries under the influence of English jurisprudence, is now a system of public transfer. Entries in a public register have taken the place of conveyances, passed from hand to hand and then locked up in a strong box or muniment room. Almost every end which the reformer of the law has in view—security of title, cheapness of transfer, clear general understanding of rights—has been obtained by these expedients, which I regard as the greatest legal discovery of the century. Now, everybody must desire that law introduced into India should be the best law of its kind ; but there are other reasons besides this why the Continental, rather than the English, mechanism of transfer should be followed by the Indian legislator. The most ancient conveyances known to us of land and of the higher kinds of property were public conveyances. They seem to have very gradually become private conveyances ; and the change began a series of complications and confusions in law which encumbered all codes and bodies of rules down to the latest stage of legal history. There were, however, some kinds of immovable property which could be alienated by methods of transfer, retaining the publicity, and therefore the convenience and simplicity, of the primitive conveyance. Such, also, were the copyhold lands of our own country, in which the advantage of transfer by entry in a court roll is considered by some to outweigh the disadvantages of an otherwise perverse tenure. Such also were the lands held by peasant tenures on the European continent ; the present land registers of the Continent may undoubtedly be traced to the manor rolls in which transfers of these lands were recorded. It is notorious, however, that in India the remnants of the primitive methods of public transfer survive in unusual abundance, and they are, in

fact, the basis of our revenue system. Under such circumstances, I cannot but consider that it would be a retrograde step to give in India any further extension to the now purely English system of private transfer, or to establish it as the normal system of the country. I am at the same time aware that, owing to the decay of the village organisation in Lower Bengal, and to the peculiarities of the revenue settlement, the above remarks are less true of that province than of other parts of the country, and I may observe that, when I originally suggested to the Indian Law Commissioners that the draft of a measure for the transfer of immovable property should be prepared, I recommended that its operation should be confined to Lower Bengal.

'I imagine that, when Mr. Justice Stephen speaks of the Land Revenue Acts and Registration Acts as the natural foundation of an Indian system of real property law, he intends to convey an opinion not widely different from mine. The subject, however, is one which has much engaged my attention of late; and I venture to present in an Appendix to this paper some unpublished observations of my own on the influence exerted upon law by the Continental systems of land registration. The purpose for which they were at first used made it convenient that the illustrations should be taken from Roman law, but the assertions made would prove, I think, to be equally true of the corresponding branches of our own legal system. It is scarcely necessary that I should recommend to the close attention of the Commissioners the remarks of Mr. Justice Stephen on the far-reaching ambiguity of the word "trust" as understood by English lawyers, and on the high artificiality of the conception which it is meant to express.

'While I concur with Mr. Justice Stephen in considering that a provisional convenience is the utmost that can be claimed for the so-called methods of "scientific" arrangement followed or proposed to be followed by the authors of codes, I should be sorry to deny absolutely that when a reasonably extensive body of substantive civil law has been enacted for India, it may conceivably be arranged in a more compact and more convenient form than that of a series of fragmentary

portions successively passed by the legislature. But the question is not of pressing importance. The opinion of the Government of India, as stated in its despatch of June 24, 1878, was that (paragraph 10) a code of civil law might be produced, circulated to the Local Governments, revised, and arranged within a period of five years; but the present Secretary of State, in paragraph 6 of his despatch of September 5, 1878, has expressed his strong objection to "any scheme for compressing the completion of the Civil Code within a period of five years, or any other definite time." And many other circumstances help to show that the expectations of the Government of India on the point were much too sanguine.

'I desire to terminate this brief paper with an assurance that my services are at all times at the disposal of the Government of India, and that the reasons given in my first paragraph are exclusively those which have made me hesitate to follow Mr. Justice Stephen in criticism on the detail of the "six codifying bills." I am bound to add that, subject to the general observations made above, and subject to some doubts as to portions of the detail which I share with Sir James Stephen, the six Bills[1] seem to me to deserve admiration, more especially for the skill and labour manifest in their workmanship.'

The following paragraphs constitute the Appendix above alluded to. Those who have learned by experience how much less troublesome a process it is to buy land in France than to buy it in England will be much inclined to adopt their teaching.

'The suggestion has often been made that real property should be closely assimilated to personalty, more especially in respect of conveyance. There ought to be no more difficulty, it is said, in transferring a piece of land than in selling a horse. I believe the analogy to be unsound, and the route

[1] These Bills were the Transfer of Property Bill (now Act IV. of 1882), the Easements Bill (now Act V. of 1882), the Trusts Bill (now Act II. of 1882), the Negotiable Instruments Bill (now Act XXVI. of 1881), and lastly, the Alluvion Bill and the Master and Servant Bill, neither of which has yet become law. In finally revising the Transfer of Property Bill, Maine's criticism was borne in mind, and throughout the greater part of British India public registration is now an essential element of all important transactions relating to land.

indicated a false one. There is far more promise in reversing than in extending the principle, in treating land as essentially unlike movables, and in a return to the ancient methods of conveying allodial land. The subject is, for several reasons, worthy of our attention.

'It is to be recollected, first, that the primitive conveyances of allodial land were, before all things, public. Land belonged to the tribe, joint family, or village community before it belonged to the individual household; even when it became private property the brotherhood retained large rights over it, and without the consent of the collective brotherhood it could not be transferred. The public consent of the village to a sale of land is still required over much of the Aryan world. Although, as we know the "Mancipation" in Roman legal history, it is a form of private transfer, it plainly bears the stamp of its original publicity. The five witnesses who had to assist at a "mancipation" represent the old consenting community, according to a principle of representation by fives widely diffused among primitive races. As a private conveyance "mancipation" was extremely clumsy, and I have no doubt it was a great advantage to Roman society when this ancient conveyance was first subordinated to "tradition" or simple delivery, and finally superseded by it. Nevertheless, the most successful modern experiments have reverted in principle to a method of transfer even older than "mancipation," and the latest simplifications of the conveyance of land are a reproduction of the primitive public transfers in the face of the community in a new form appropriate to large and miscellaneous societies.

'In France and in the territories incorporated with the empire of Napoleon I. there has existed, ever since the establishment or introduction of the Code called by his name, a system of publicly registering sales and mortgages of land. In some of the Germanic countries there was long a disinclination to adopt these expedients, but they have now been almost universally copied on the Continent, and, as sometimes happens, the new system is most perfect where the delay in accepting it was longest. The land registries which receive the highest commendation from juridical writers are those of

certain small Teutonic communities—for instance, the State of Hesse-Darmstadt and the Canton of Zürich. I can here give but a brief description of the mechanism. The land of the community is divided into a number of circumscriptions of no great area. For each of these a central office is established, with a staff of functionaries—who are, to some extent, experts—and at each office a register is opened in which separate portions or groups of pages are appropriated to separate masses of land. There has been some controversy as to what the area selected for separate treatment should be —whether a space determined by land measurement, or, as we should say, an estate, an aggregate of lands once held as a single property; but I believe that the historical system, that which deals with estates rather than with areas settled by land surveyors, has been found practically the most convenient. When the register has once been opened, the legal history of every parcel of every area is thenceforward recorded in it, and every transfer or mortgage must be registered in it under pain of invalidity. Whether a person wishing to sell or mortgage has the right to do so, it is the business of the staff of experts to ascertain. It is absolutely essential to the system that the register should be easily accessible, and the formalities of registration simple and cheap.

'The nearest English analogy to this new foreign system is to be sought in the court rolls of manors, and it is sometimes asserted by lawyers that the manifold disadvantages of copyhold property are compensated by the many conveniences arising from its registration in these rolls. As to the great mass of English freehold property, there is a general admission among lawyers of the expediency of registration, but vehement dispute as to the best method, and a certain disposition to look upon the practical difficulties as insuperable. It is true that these difficulties are far greater than abroad. Our land law is much more complex than the land law of Continental countries, where it has its counterpart, if it has any, in the exceptional law applied to the estates of a limited number of noble families; and English real property law has been still further complicated by the liberty of transfer and devise which we have enjoyed from a comparatively early period.

The great difficulty with us lies in the preliminary process of ascertaining whether a person desirous of selling or mortgaging has the right to do so; but this, in most Continental countries, is a comparatively easy matter, the bulk of the land having been held, until the early part of this century, by a tenure of strict villeinage, or, as we should say, in copyhold.

'My immediate object, however, is not to pass a eulogy on the principle of conveyance by entries in a register, or to weigh one system of registration against another. I wish rather to point out some remarkable consequences of registration which ought to have our attention in our special branch of study. A short time since I stated that the problems once solved by the expedient of "warranty" were common to all bodies of jurisprudence. What is to be done in the case of the man who is in fact exercising all the powers of an owner, but who has no title to show? Is he to be at the mercy of anybody who chooses to injure or disturb him? The Roman law answers this question by providing the vast body of rules which constitute the chapter on possession. What has to be done with the man who has bought with the proper formalities but not from the true owner, or from the true owner but not with the proper formalities? The answer of the Roman law consists in the doctrines of "bonâ-fide possession" and of ownership "in bonis," "bonitarian" or equitable ownership. Is the bonitarian owner or the possessor, with or without good faith, always to have an imperfect title? The reply is in the great departments of law concerned with usucapion and prescription. If a man mortgages his property to a number of creditors, in what order are they to be satisfied? The volume of rules by which all systems try to solve this problem is quite enormous. But it is very remarkable that, where there is a perfect system of land registry, the strong tendency is to revert to the doctrines of Roman law as it must have been before possession, usucapion, and bonitarian ownership grew up. The registry of the sale or mortgage of land being extremely easy, expeditious, and cheap, there is a marked disposition among the authors and expositors of law to say to the members of the community, "Either register your

transfers or mortgages, or cause them to be registered, or you shall have no rights whatever. If you neglect doing that which is in your power to do at any moment, and at a trifling cost in time and money, you shall not have the benefit of possession, of bonitarian ownership, or usucapion, or prescription. At most there shall be an action of contract to compel the seller of land to register and the buyer to pay the purchase-money. As regards mortgages, they shall rank in the order of priority of registration, and if you delay going through the proper formalities or compelling them to be gone through, you, the mortgagee, will be postponed to creditors more diligent than yourself, and you will be satisfied after them."

'I follow German writers of authority in saying that this is the condition to which legal doctrine is approximating in much of Germany, though it is not quite adjusted to it. The singular result is that some of the most intricate and difficult chapters of law cease to be of any or much importance. The expedient of public registration is, it will be seen, purely mechanical; a contrivance, very like it in principle, spontaneously and very early suggested itself to the human race; nevertheless, where a public registry of mortgage and land transfer has been established, some of the most famous and luxuriant branches of law show a tendency to dwindle and wither away under its shadow. Possession, usucapion, bonitarian ownership, and hypothek occupy together a prodigious space in the Roman jurisprudence; the bulk of what corresponds to them in other systems of law is very great; if they are reduced to a fraction of their present dimensions, the diminution of the aggregate body of law will be extraordinary, and will have been produced in a most unexpected way.

'I have dwelt on these Continental systems of land registration, and on the effects attributed to them by German juridical opinion, for two reasons.

'In the first place, the fact is certainly curious that the latest improvements in the mechanism of mortgage and land transfer involve a reversion to the primitive publicity of conveyance. The public register at some accessible spot, in which all transactions must be registered under penalty of

immediately forfeiting all their benefits, pretty much corresponds to the primitive assembly of the village, before which all transfers of shares in the domain must be accomplished, in order that the brotherhood may consent to them, and supply evidence of them by the general recollection. It is true that the ancient formalities had one object which has nothing to do with the modern. The primitive publicity of transfer went with a most rigid exclusiveness, and the public consent, which was insisted upon, was employed to refuse the power of purchase to strangers. The decay of the ancient public conveyances was very probably caused by a change of circumstances, which made the communities either unable or unwilling to maintain their collective control over the land of their domain. In modern India the growth of wealth has greatly stimulated the spirit of individualism; buyers and sellers of land alike become impatient of the necessity for obtaining the public consent of the villagers to their bargain. The modern Anglo-Indian is unfavourable to these archaic restrictions, and thus the primitive public methods are everywhere giving way to private transfers, which assume, I am sorry to say, at present very heterogeneous forms. In the historically ancient world the same results were most probably produced by conquest, and by the absorption of one or more of the primitive proprietary groups by others stronger than themselves.

'In the Roman State, including a population even more and more miscellaneous, we find at the outset of legal history a mere shadow of the old forms of transfer in the "Mancipation," and mancipation, long before its abolition by Justinian, was subordinated by every sort of legal contrivance to mere delivery or "tradition." Yet even tradition, when it became the sole Roman conveyance, retained some trace of the institutions out of which it grew. The Roman law never to the last allowed the dominium or right of property to be passed from one person to another by a mere contract; it was absolutely necessary that the contract should be followed by the delivery of the thing which was its subject. This is a peculiarity which has, more than once, caused perplexity to persons who have consulted the Roman law of transfer in

ignorance of its being founded on a principle which the English law and the French code have abandoned.

'The other fact to which I wish to call attention is not merely curious, but highly instructive. The tendency of German juridical opinion which I have mentioned shows that we are in danger of over-estimating the stability of legal conceptions. Legal conceptions are indeed extremely stable; many of them have their roots in the most solid portions of our nature, and those of them with which we are most familiar have been for ages under the protection of irresistible sovereign power. Their great stability is apt to suggest that they are absolutely permanent and indestructible, and this assumption seems to me to be sometimes made, not only by superficial minds, but by strong and clear intellects. I am not sure that even such juridical thinkers as Bentham and Austin are quite free from it. They sometimes write as if they thought that, although obscured by false theory, false logic, and false statement, there is somewhere, behind all the delusions which they expose, a framework of permanent legal conceptions which is discoverable by an eye looking through a dry light, and to which a rational code may always be fitted. What I have stated as to the effects upon law of a mere mechanical improvement in land registration is a very impressive warning that this position is certainly doubtful, and possibly not true. The legal notions which I described as decaying and dwindling have always been regarded as belonging to what may be called the osseous structure of jurisprudence. The fact that they are nevertheless perishable suggests very forcibly that even jurisprudence itself cannot escape from the great law of evolution.'

Second, but only second, to the repression of the sanguinary raids and the chronic private wars which desolated India before our power was asserted over the whole peninsula, ranks as the greatest of the many benefits which British rule has conferred upon India the wide extension of codification. The Indian codes are not complete, and what exists of them is not perfect, but with reference to the large portions of law

of which they treat there are no better codes in the world, and if they are compared with the hideous chaos which we call law at home, which no layman understands and no lawyer can practise without having a library at his elbow, they are as light to darkness. Macaulay's admirable dictum has been kept in view throughout their formation. 'Our principle,' he said, 'is simply this. Uniformity when you can have it, diversity when you must have it, but in all cases certainty.' They originated in a correspondence which took place in or about 1829 between Sir Charles (afterwards Lord) Metcalfe and the judges of Bengal. A long series of able men from Macaulay downwards have contributed to make them what they are. The only pity is that there seems just at present to be a lull in the activity, not of their framers, but of those whose business it is to enact them when framed. For some reason or other, the Government of India has pigeon-holed for many years a Bill drawn by the hand of no less an authority than Sir Frederick Pollock relating to torts or actionable wrongs. There may be some good reason for this, but if there be, it has not been made known to those who, one would expect, would be best informed about such matters.

It has sometimes been imagined that certainty of law was not agreeable to the races of India, and that they liked better a system of happy-go-lucky and individual will. A greater mistake was never made. The true doctrine on that subject was admirably put some years ago by a highly respected leader of the Indian Muhammadans, Sir Sayyid Ahmad :—

'So far as I am aware, the native public has never raised its voice against codification. To them, codified laws mean the introduction of certainty where there is uncertainty, precision where there is vagueness. Nor can it be said that codification is unpopular, even among the most conservative sections of my countrymen. I must have lived to declining old age amongst them in vain if I am not, even at this time

of life, in a position to say confidently that of all the innumerable blessings of the British rule the one my countrymen esteem most is justice. Justice in their eyes means peace and order, which in other words mean security to life and property—the sole aim and end of government. At present, whilst a splendid penal code and a criminal procedure (code) regulate criminal matters, the civil law is administered on the somewhat vague, though noble, principle of "justice, equity, and good conscience"—a principle much of whose beauty is practically spoilt by the fact that individual judges in similar cases do not take the same view of that noble maxim. The result is an uncertainty as to rights which reduces litigation to a form of pecuniary speculation, [and] from which springs that most deplorable class of suits in which the parties, agreeing as to facts, have no authoritative means of ascertaining the law. Codification, and codification alone, can remedy the evils which arise from uncertainty of the law; codification alone can enable the public to know their exact rights and obligations; codification alone can enable proprietors, and litigants, advocates, and judges to know for certain the law which regulates the dealings of citizens in British India; codification alone will enable the deliberate will of the legislature to prevail over the opinions of individual judges, and litigants will then be more anxious before going into court to consult the Statute-book of the land than the mental proclivities of the individual judges before whom their disputes may have to go for decision.'

There is not the shadow of a doubt that all of us in England—save those who have, or think they have, a distinct interest in keeping up the present confusion of our own system—would hail with delight the codification of our own law, and that every individual in the community would greatly benefit by it; but to hope that by the end of the third decade of the twentieth century we shall have got even as far as they have got in India now would be to be very sanguine indeed. Nevertheless, when the thing has once been done, every decently educated man and woman in the country

will say that it ought to have been done a hundred years before.

In 1881 Maine delivered an interesting lecture, at the Royal Institution, upon the 'King and his Relation to Early Civil Justice.'

In the year 1883 he published a further work which may be considered as the last of the series which was begun with 'Ancient Law;' it was entitled 'Dissertations on Early Law and Custom.' Like its two immediate predecessors, it was a result of its author's tenure of the Corpus professorship of Jurisprudence, but the chapters of which it was composed had been a good deal altered in the interval between their delivery as lectures and their being placed before the world in their final shape. Nearly half of them had appeared as Articles in Reviews. The sacred books of the East, translated under the superintendence of Professor Max Müller, had almost as much influence on this work as the translations of the Brehon Law Treatises had upon the one which came immediately before it. The fifth chapter, on 'Royal Succession and the Salic Law,' shows its writer at his very best. The later portions of the volume, dealing with forms of property and tenure and with various legal survivals, are perhaps, though most valuable, less generally interesting, with the exceptions of chapter eight on 'East European House Communities,' and chapter nine on the 'Decay of Feudal Property in France and England.'

There are many passages in this work which might be conveniently detached for quotation if space would admit; but I will content myself with one:—

'There is reason, in fact, to believe that at some period of human history a revolution took place in the status of aged men not perhaps unlike that which is still proceeding in the case of women. There is abundant testimony that tribes, long pressed hard by enemies or generally in straits for subsistence, systematically put their members to death when too old for labour or arms. The place from which a wild Slavonic

race compelled their old men to leap into the sea is still shown. And the fiercer savage has often in many parts of the world made food of them. Nevertheless, the ancient records of many communities, especially those of Aryan speech, show us old age invested with the highest authority and dignity. Mr. Freeman has given a long list of honorific names belonging to classes or institutions, which indicate the value once set by advancing societies on the judgment of the old. Among them are, Senate, γερουσία (the Spartan senate), δημογέροντες (its Homeric equivalent), πρέσβεις (Ambassadors), Ealdorman, Elder, Presbyter, Monseigneur, Seigneur, Sire, Sir, and Sheikh, and Mr. Freeman closes with the Old Man of the Mountain. So great a number of titles, civil and ecclesiastical, are evidence of a very strong sentiment, and suggest that this exaltation of old age was a definite stage in the ascent to civilisation.

'There is a story of a New Zealand chief who, questioned as to the fortunes of a fellow-tribesman long ago well known to the inquirer, answered, "He gave us so much good advice that we put him mercifully to death." The reply, if it was ever given, combines the two views which barbarous men appear to have taken at different times of the aged. At first they are useless, burdensome, and importunate, and they fare accordingly. But at a later period a new sense of the value of wisdom and counsel raises them to the highest honour. Their long life comes to be recognised as one of preserving experience. The faculty of speech, which separates man from the brute, and the art of writing, by which the society capable of civilisation is distinguished from the society condemned to permanent barbarism, are simply methods by which experience is enlarged, compared and transmitted, and by which mankind is enabled to have more of it than is contained in single separate lives. Yet the individual life is always the original source of experience, and at some time or other it must have been perceived that the more the individual life was prolonged the larger was its contribution to the general stock. This seems the best explanation of the vast authority which, in the infancy of civilisation, was assigned to assemblies of aged men, independently of their physical power or military prowess.

It probably sprang up among communities which had no writings to learn from, and who were conscious that the importance of the arts which were necessary for their very existence was out of all proportion to the average shortness of life.'

The contents of this work, while highly informing to all those who are interested in the very earliest history of the human race, were not calculated to attract the attention, still less to excite the passions, of those who are mainly occupied with the events of the day and the probabilities of the nearest future. That was not the case with its author's next book.

In 1885 Sir Henry Maine published, under the title of 'Popular Government,' four essays, the substance of which he had contributed to the 'Quarterly Review.' The first of these was entitled, 'The Prospects of Popular Government,' the second 'The Nature of Democracy,' the third 'The Age of Progress,' and the fourth 'The Constitution of the United States.' In the preface he informs his readers that it had long been his desire to apply the historical method to the political institutions of men as he had in his 'Ancient Law' and, as he might have added, in other works which have been already noticed, to their private laws and institutions. Just, however, as he had found the path of his legal investigations obstructed by baseless theories about a law and state of nature antecedent to all laws of which history makes mention, so he found the path of his political investigations obstructed by other equally fantastic assumptions about a series of political institutions of which history makes no mention, but which a number of writers, with Rousseau at their head, have imagined to have existed in a period antecedent to history. The political institutions of this far-off time were conceived by those writers to have been of a highly popular character. Maine's object in writing this work was to examine the phenomena of popular governments in so far as they had been registered by those who had observed them, putting out

of sight all theories about a state of things with regard to which it was simply impossible to know anything whatever. In the first essay he maintains, *inter alia*, that popular government since its reintroduction into the world after the long interval which followed the disappearance of such popular governments as existed in antiquity, has been extremely fragile. In the second essay he gave some reasons for thinking that, at least in its extreme form, popular government was exceedingly difficult. In the third he argues that the perpetual change which accompanies what we call 'progress' is not in accordance with the facts of human nature in so far as these facts have been observed and registered, not deduced from some hypothesis as to what human nature ought to be. In the fourth he examines the constitution of the United States, and draws special attention to such of its provisions as are calculated to minimise some inconveniences which he believed to attach to it.

It was inevitable that in a work of this kind a good deal should be said which conflicted with hopes and expectations very widely received. As I have already pointed out, Maine's connections were originally with the Liberal-Conservative or Conservative-Liberal party; and, although he never was a politician, and twice refused—first on the retirement of Mr. Walpole, then on the death of Mr. Hope—to represent the University of Cambridge in the Conservative interest, his sympathies with what we may call the liberalism of the centre were imperfect, while he had absolutely no sympathy at all with the very different opinions which are now described as Liberalism in Gladstonian circles.

I find it difficult, however, to think of Maine as an English politician at all. The circumstances of his life had kept him far away from the din of our Parliamentary smithery.

It was inevitable, however, that a book like 'Popular Government' should be treated as a 'rattling political pam-

phlet' by those who did not agree with the conclusions to which it pointed, and so it was; while, on the other hand, it reached a class of sympathetic readers which had never occupied itself with its author's earlier works. It is no part of the duty of the writer of a brief memoir like this, or even of a biographer, to make himself a judge or a divider in such controversies, more especially if his strong bias in favour of one party in the State is a matter of notoriety; but assuredly 'Popular Government' is not a book which any Englishman who studies politics can afford to leave unread.

In 1886, Maine contributed to the 'Quarterly Review' an article on the 'Patriarchal Theory.' It is a temperate and judicious review of the rival theories of Mr. J. F. McLennan, of his brother, of Mr. L. Morgan and others, counselling their partisans, always ready to send the souls of their opponents to eternal perdition for their 'theory of the irregular verbs,' to greater moderation in controversy and to a more patient inquiry into the extremely complicated facts which underlie their lucubrations.

In 1886 he published a brief but notable article in the 'Nineteenth Century.' This was a reply to a paper in the preceding number of that review, by Mr. Godkin, the well-known editor of the American newspaper 'The Nation.' Mr. Godkin had criticised 'Popular Government,' but Maine shows that his critic had been misled by a hasty perusal or imperfect recollection of what were, indeed, carefully weighed and guardedly expressed sentences. The article ends with the words:—

'Mr. Godkin seems to think that the only evidence worth mentioning for the duration of democracy is that furnished by the United States, and I think so too. He thinks, at least he gives reasons for thinking, that the prospects of scientific thought in democratic societies are very gloomy, and that also is my opinion. We have reached these results by different routes, but the results do not greatly differ.'

He kept up to the end his old interest in journalism, writing every now and then in some of the most important newspapers. I do not know to what extent he treated in later years the mere passing subjects of the hour, but I have repeatedly seen articles which were obviously from his pen on such subjects as the 'Constitution of Upper Houses in Various States,' and on many large questions of Indian Government.

In the year 1887 Sir Henry Maine contributed a paper on India to the interesting volume edited by Mr. Humphry Ward, under the title of 'The Reign of Queen Victoria,' in connection with the Jubilee. It is not long—a little under seventy pages of pretty large print, but I could not refer a foreign inquirer to anything at all of the same length from which he would obtain so many correct ideas about our wonderful Eastern experiment. Some portions of it—as, for instance, that which relates to Mr. Bright's views about the mischief of over-centralisation in India—may even be studied and meditated with advantage by some persons who have given very serious attention to the future of that country. It is all the more creditable to Sir Henry that he should have come to such wise conclusions because he had looked at Indian affairs only from the point of view of the Central Government, first at Calcutta and then in the India Office. It is easy enough for one who has been long at the centre of Indian affairs, and has then seen the working of the machine from the provincial point of view, to see its defects in the matter of over-centralisation, but very much more difficult to do so without the help of the second kind of experience.

About the time that this masterly essay appeared, Maine succeeded Sir William Harcourt as Whewell Professor of International Law at Cambridge. His new appointment gave him an additional tie to his University, and made him think very seriously of leaving the India Office for duties which were even more congenial. Before he went to Calcutta, he had

written a book on International Law, the manuscript of which somehow disappeared in his absence. This accident no doubt cost him, and would have cost him had he lived, a good deal of trouble; but the studies of a quarter of a century and a large experience of affairs must have very considerably modified his views, and it would probably have been better for his fame that it should have rested on his mature work. He was not destined, however, to leave much behind him on a subject on which his *mitis sapientia* would have been pre-eminently valuable; he only delivered one course of lectures, and these never received his final revision. The book in which they are contained, entitled 'International Law,' was published after his death. The fact that it received the editorial care of his pupil and intimate friend, Mr. Frederic Harrison, as well as that of Sir F. Pollock, is a guarantee to the public that the work was as well done as it could be, but the volume remains a fragment—a torso, not a statue.

These lectures having only been corrected for delivery by the author, and not revised for the press by him, must be judged merely as twelve lectures given in a single term and intended to form part of a very much longer course, of which, probably, only the essence would have been laid before the public in the form of a book or books. Judged as lectures they do no sort of discredit to their author's reputation, and remind me often of those which were afterwards worked together into Ancient Law, though of course he was dealing in them with a subject the outlines of which are more familiar to many of us than was the matter which he treated at the Middle Temple in his early days.

He began the first of his lectures, which treats of the origin and sources of International Law, by recalling the injunction of the founder of the chair that its occupant should make it his aim, in all parts of his treatment of the subject, to lay down such rules and suggest such measures as might tend to diminish the evils of war and finally 'to extinguish war among

nations.' He proceeded to point out the immense forces arrayed against this most blessed consummation: the enormously increased armies of the Continent, far greater in peace than they ever were even in the days of the Napoleonic struggles, the vast amount of intellect which now goes to the perfecting of warlike appliances, the huge expenditure of treasure which a single naval battle would bring about, when a gun which can only fire 150 shots without being repaired costs 20,000*l.* and has, during its brief life, fired away more than its own value in charges. Well might he add: 'I repeat, then, my question, when the forces at work are so enormous, how shall they be controlled, diminished, or reduced by a mere literary agency?'

He commences his reply to that question by pointing out that, bad as things are, they were once very much worse. War was originally the rule, peace the exception; prisoners were murdered with the utmost barbarity. Even slavery was a humanitarian reform. Very slowly and gradually wars had been getting less hideous, when the religious quarrels of the 16th century stimulated human passions to a frightful degree, and a recrudescence of horrors was the result. These horrors produced a great effect upon contemporaries, and had a share in calling into existence the body of jurists who, from Grotius to Vattel, built up the system which we now know as International Law. In laying the foundations of their system they availed themselves to a great extent of the Roman law, which had never wholly died out in Europe, but had been contentedly used by jurists to eke out the provisions of barbarian codes. The portion of it which they found most ready to their hand was the Jus Gentium originally created by the Roman prætor peregrinus when he selected the rules of law common to Rome and to the different Italian communities in which the immigrants into Rome were born. This, in its turn, when seen in the light of Stoic doctrine, became identified in the minds of educated Romans with the Law of Nature—that is,

the sum of the principles of conduct which man in society was imagined by the best minds in Rome to obey simply because he was man. If we ask when this idea grew up, Maine would point to the fruitful 300 years of the Roman peace, the very period during which the Christian Church was consolidating itself.

Having pointed out how International Law arose, Maine then examines its authority and sanction, showing how it is not a law in the sense in which that word is used, and very properly used, by Austin, but that the founders of International Law, if they did not, and could not, create what that writer and other jurists call a 'sanction,' nevertheless created a law-abiding sentiment which makes it most desirable that those who are concerned with public affairs should be acquainted with such portions of International Law as appear to be reasonably settled.

The third and fourth lectures deal clearly and ably with State Sovereignty and territorial rights of sovereignty, but the fifth and sixth are more important—are indeed the most important in the volume, for in them Sir Henry took for his subject Maritime Belligerency and the Declaration of Paris, matters of paramount importance to this country, but which, to the disgrace of British statesmanship, have never been really faced by either of our great parties. They were discussed in the House of Commons in 1862, in 1877, and in 1878. All these debates I heard, taking part in two of them, and in all of them I think the advantage remained with the advocates of the views which afterwards found favour with Sir Henry Maine. Lord Palmerston in the year 1856 accepted these views to a very great extent; but he afterwards recanted and declared that to give up our rights of capturing the enemy's mercantile marine would be to commit an act of political suicide.

After the Crimean war, when the United States declined to adhere to the Declaration of Paris unless private property

was exempted from capture at sea, the question might have been easily settled. It is not impossible that it might have been settled at Berlin in 1878. Now, however, it is much to be feared that it will be more difficult to get other States to see that all the world would benefit by changes which might, as Sir Henry well says, 'be suggested by some very great friend of this country.' However much we may increase our navy, we shall be wholly unable to prevent very serious losses to our mercantile marine as long as the present detestable state of the law is allowed to endure. Whatever may be the bearing upon other nations of the changes suggested, it is for us of immense importance that the power of seizing or destroying private property at sea should be utterly abolished, that the list of articles which should be considered contraband of war should be made as short as possible, and that the whole subject of the right of blockade should be carefully examined with reference to the present state of land, as well as of sea, communications. It is a vain labour to blockade a coast, if the people living on that coast can obtain the goods of which you want to deprive them by half a dozen railways running thither from the interior of their territory.

The next five lectures treat chiefly of the changes that have been introduced into the customs of war during the course of history, and more especially of those customs as now followed by civilised nations. Due credit is given to the initiative taken by the late Czar in trying to bring about a mitigation of the horrors of the battlefield, and much use is made of the Manual compiled chiefly, it would appear by Lord Thring, for the use of English officers in the field. Every page of this portion of the work is worth study, but the twelfth and last lecture is probably the most valuable after the fifth and sixth. In it Sir Henry discusses the possibility of abating war by arbitration, points out the very grave inconveniences of the present system of appointing a

Court of Arbitration *ad hoc*, more especially in the case of a State like England, of whose comparatively great prosperity all other nations are jealous. He then shows that a standing Court of Arbitration supported by all the Powers would have many advantages, but would nevertheless labour under the master disadvantage of having no force behind it, unless all the Powers were to hold themselves prepared to intervene to make the intending belligerent, against whom the tribunal decided, keep the peace, an arrangement which would necessitate keeping on foot the existing great peace armaments. If these continue Europe may well be reduced, as Gambetta once put it in a conversation with me, 'to beg at the gates of the barracks.' Probably Sir Henry is right in thinking that no sweeping remedy for that and other evils can be introduced, but that something like the functions of the Greek Amphiktyony can be provided by great leagues of peace such as that of which we hear so much at present.

I cannot say that when I returned from India in the spring of 1887, after an absence of between five and six years, I found Maine much changed. He had lost some of his interest in things around him, but did not appear to me in a much worse state of health than usual. I met him, as it turned out for the last time, at the Deanery of Salisbury, where we spent a day or two together in the July of 1887. He did not take very much part in conversation, but nothing led me to suppose that he was breaking up. In the autumn I went to Syria, and in the course of the winter received a letter from a friend at Cannes to say that Maine had arrived there in very bad health. I replied that, although Maine's health was liable to be disturbed by very frequent illnesses, I thought he would live to be quite an old man. I was mistaken, however, and not on this occasion, as in 1862, agreeably; for ere very long I heard that he had died on February 3, apoplexy being the immediate cause.

From what I have since learnt, he must have been getting

rapidly weaker all through the autumn, and I have been told by a gentleman who saw him on his journey to Cannes that he thought the symptoms even then excessively grave.

Sir Henry Maine left a widow and two sons to deplore his loss, but the eldest son Charles—a young man of much promise though of very delicate health, who had done some good work in Egypt, and was, when he died, clerk of assize on the South Wales circuit—did not long survive his distinguished father.

Sir Henry's features have been perpetuated most successfully in an admirable portrait at Trinity Hall by his connection and friend Mr. Lowes Dickinson, and by a medallion in Westminster Abbey, which is far from being worthy of the well-deserved reputation of Sir Edgar Boehm. It is placed in a portion of the building to which a good deal of Indian fame has found its way, some of it of a secondary kind; but there, too, an inconspicuous bust recalls to a generation which, chiefly through the labours of Maine's intimate friends Sir James Stephen and Sir John Strachey, is beginning to judge of him more justly, the mighty name of Warren Hastings.

The chorus of appreciation which rang through the press for some days after the death of Sir Henry Maine was known showed how widely he had been appreciated amongst able men who took very different views of most things divine and human. The 'Times' spoke of him as a man of the calibre of Montesquieu and De Tocqueville, brought out the relation between Ancient Law and Darwin's 'Origin of Species,' published shortly before it—'the pregnant conception of evolution being the link that binds them together'—and quoted from a private letter of the year 1885, in which, speaking of Mr. Morley's criticisms on 'Popular Government,' he said:

'If there were an ideal Toryism I should probably be a Tory; but I should not find it easy to say which party I should wish to win now. The truth is, India and the India

Office make one judge public men by standards which have little to do with public opinion.'

The 'St. James's Gazette' mentioned the fact that Maine had been among its most frequent contributors, and added:

'In his earlier days he would have called himself a Liberal, seeing that he favoured on the whole that moderate, cautious, constitutional Liberalism which in the past has done so much for liberty, for progress, and for ordered reform. Latterly he was a pronounced and uncompromising Anti-Radical, because he saw, perhaps more clearly than any man alive, that Radicalism pushed to its logical conclusions means the rule of ignorance, of charlatanism, of blind rapacity, and the banishment from the sphere of politics, of science, of sober sense, of experience ripened by learning and knowledge of affairs.'

The 'Spectator' said:

'Sir Henry, for all his wisdom, could not have governed a kingdom. His mind foresaw dangers, difficulties, impediments with too keen a glance, and in the supreme hour he would have shrunk from indispensable decisions. He had neither the force nor the energy of Lord Lawrence, who, nevertheless, though his temptation was to over-estimate "go," recognised to the full the great powers, sometimes even the superiority, of his wise and learned coadjutor. What Sir Henry could do, and constantly did do, was to bring his magnificent brain to bear on a mass of observed facts, reconcile them, detect the law which governed them, and suggest legislative action in words of unequalled persuasiveness. In this latter faculty, that of convincing qualified minds, Sir Henry Maine was possibly unrivalled in his generation; and the way in which he employed it was as special as his success. He melted his opponent's views.

Sir Frederick Pollock, who has been already quoted, and who is brought, in the nature of things, into the closest contact with students of jurisprudence, says:

'For the present we may at least say, looking to our own science of law, that the impulse given by Maine to its intelligent study in England and America can hardly be overrated.'

And again:

'At one master-stroke he forged a new and lasting bond between history and anthropology. Jurisprudence itself has become a study of the living growth of human society through all its stages. And it is no longer possible for law to be dealt with as a collection of rules imposed on societies, as it were, by accident, nor for the resemblances and differences of the laws of different societies to be regarded as casual.'

Not a few foreign scholars have in various ways expressed their admiration. Professor F. von Holtzendorff wrote about Sir Henry in the 'Law Review,' as did the French M. Glasson and the Italian M. Cogliolo.

M. Courcelle Seneuil, in an interesting introduction to his translation of 'Ancient Law,' says that the only French work which can be compared with it is the 'Cité Antique,' by M. Fustel de Coulanges. He appreciates in the very highest degree the merit of Maine's great work, and his praise is all the more valuable because he makes some reservations, thinking the great English jurisconsult has not attached sufficient importance to commercial usage as an agency in modifying and reforming laws. He points out, too, that Maine by his use of the term Benthamism gives, no doubt unintentionally, to Jeremy Bentham the honour which is certainly largely due to older thinkers, more especially to Quesnay and Turgot.

One of the best articles upon Sir Henry which I have seen appeared in the 'Revue Générale du Droit,' with which he had been connected. The 'Notice sur la vie et les travaux de M. Sumner Maine' for the 'Académie des Sciences morales et politiques' was signed by M. Rodolphe Dareste, Member of the Institut and author of the 'Études d' Histoire du Droit.' It ends as follows:—

'Les idées politiques de M. Maine ont été vivement discutées. Qu'on les partage ou qu'on les combatte, elles n'en méritent pas moins l'attention et le respect, comme le jugement d'un profond observateur sur les événements contemporains. Mais le principal titre de M. Maine à l'estime du monde savant consistera toujours dans ses précédents ouvrages, et dans l'impulsion extraordinaire qu'il a imprimée à la science du droit. Ses livres ont été traduits dans toutes les langues de l'Europe, et les éditions ont été multipliées. Bien peu d'ouvrages de droit ont eu pareille fortune. Et pourtant ceux de M. Maine ne sont pas toujours d'une lecture facile. La perspective, qui met en relief les choses principales et relègue au second plan les accessoires, l'unité, qui subordonne tous les développements à une seule pensée dominante, l'enchaînement, qui les rattache étroitement les uns aux autres, sont des qualités auxquelles les Anglais sont moins sensibles que nous et que M. Maine ne recherche pas. Son style est celui d'une conversation familière, pleine de digressions et d'anecdotes, éblouissante par le piquant de la forme et surtout par l'abondance des idées qui semblent jetées au hasard et à pleines mains. Il est peut-être parfois difficile de le résumer, mais il est impossible de le lire sans éprouver cette excitation qui tient l'esprit en éveil et le pousse en avant. Cela seul suffirait pour faire vivre les ouvrages de M. Maine. En ce siècle où la science marche vite, ils seront bientôt dépassés; ils le sont déjà, pour le fond. Mais il restera toujours l'impulsion donnée, la méthode pratiquée, les idées largement répandues. C'est là l'essentiel. M. Maine a donc bien servi la science, et l'Institut de France doit lui être reconnaissant.'

If M. Dareste puts it a little too strongly when he says that Maine's works have been translated into all the languages of Europe, they have undoubtedly been translated into many of them; 'Ancient Law' even into Hungarian, 'Village Communities' very naturally into Russian, where these highly interesting relics of the past still survive.

His career was well summed up in the tablet erected in the cloisters of Christ Hospital, to which I have alluded on a previous page.

IN MEMORY OF
SIR HENRY JAMES SUMNER MAINE,
K.C.S.I., F.R.S., LL.D. CAMB., D.C.L. OXON.

Entered in 1829 as a Scholar of this House, he proceeded therefrom to Pembroke College, Cambridge, in 1840, on one of the Hospital's Exhibitions; and, after an exceptionally brilliant University career, in which he gained the highest honours, was chosen Tutor of Trinity Hall; and shortly afterwards, in 1847, Regius Professor of Civil Law in the University. Called to the Bar in 1850 by the Honourable Societies of Lincoln's Inn and the Middle Temple (to which latter Society he was sometime Reader in Jurisprudence and Civil Law), he published in 1861 his great work on 'Ancient Law.' In 1862 he proceeded to India as Legal Member of the Supreme Council of the Governor-General, at the most critical period in the history of English law and judicature in that vast dependency. He was afterwards elected Chancellor of the University of Calcutta. Returning to England in 1869, he was elected Corpus Professor of Jurisprudence in the University of Oxford, and in 1870 appointed under special Act of Parliament life member at the seat of government in London of the Council of the Secretary of State for India. In 1877 he was unanimously elected Master of Trinity Hall; in 1883 made Foreign Associate of the Institute of France; in 1887 elected Whewell Professor of International Law in the University of Cambridge; and in the same year Honorary Fellow of Pembroke College.

He died suddenly at Cannes, in the fulness of his intellectual powers, on February 3, 1888: Christ's Hospital thus losing a most illustrious son, the State one of its most eminent jurists and legislators, the republic of letters one of its most brilliant luminaries.

This tablet is erected by governors and former scholars, that for all succeeding generations of 'Blues' it may point the moral:—

'Success and Glory are the children of Hard Work and God's Favour.'

It is an open secret that the masterly sketch of his character in the 'Saturday Review' of February 11, 1888, which I am permitted to reproduce, was the work of one who was more intimately associated with him in public and in private than was any other man.

'The admirable biographical notice of Sir Henry Maine which appeared in the "Times" on Monday last would dispense us from saying anything more if he had not stood in a peculiar relation to the "Saturday Review," and to most of its original contributors, of whom he was one of the most distinguished. This article is written by one of them who knew him for more than forty years; lived with him during nearly the whole of that long period upon terms of brotherly intimacy and affection, never interrupted by the smallest passing cloud, and was for upwards of thirty years connected in the closest way with all his undertakings, literary, legal, and political.

> His saltem accumulem donis et fungar inani
> Munere

is a perfect expression of the two sentiments which his death rouses—the moral impossibility of keeping silence on the occasion, and the emptiness of all that can be said. The biographical part of the article in the "Times" supersedes the necessity for any narrative of the events of Sir Henry Maine's life, but it leaves something to be said on his character.

'The whole colour of his career, the nature of his successive undertakings, and the way in which he carried them out, depended upon his physical constitution. The writer in the "Times" correctly states his physical advantages as a lecturer. He had a striking face, a remarkably powerful voice, and a rather tall and well-proportioned figure; but he was from boyhood essentially delicate, and he overtaxed such strength as he had at the beginning of his career. Till he was forty years old he hovered on the verge of being an invalid, and had several most trying and tedious illnesses. He was forced by one of them to refuse the first offer made to him of the office of Legal Member of Council in India, and it was only the accident of Mr. Ritchie's death, after holding the office for six months, that enabled the country to obtain Sir Henry's services. The Indian climate suited him, and he returned to England a healthier man than he left it, but he was never robust. He suffered of late years from various ailments, which gave his friends much uneasiness; and his death was preceded by many months of ill health of a distressing kind.

'One effect of this was that he never, after he took his

degree, was physically capable of severe continuous drudgery. In no one of the three professions which he followed, and in each of which he excelled nearly all his competitors, did he go through the elaborate processes of detail which in nearly every case are requisite to success. He was not one of the journalists who can sit in court pleading cases all day and write articles all night. He was not one of the Indian administrators who are as much at home in the saddle as at the desk. No man of our time did so much for the revival of the study of Roman Law; but it is greatly to be doubted whether he had any special familiarity with the Pandects or the Code. Sir Henry Maine's great peculiarity, his unique distinction, was that, by extraordinary care and skill in the use of mental gifts equally extraordinary, he was able to pursue with triumphant success three several professions of the most arduous kind, without the assistance which great physical strength and energy would have given him, and without treading in the routine to which each of them, as a rule, confines those who follow it successfully. The most obvious of these qualities were an almost preternatural quickness of understanding and facility of expression. Sir Henry Maine could read a thick volume, and that in such a way as to appropriate what concerned him in it, whilst an ordinary man read a hundred pages. One would have said that his brain and nerves were on the very verge of morbid excitability if his temper had not been remarkably sweet, gentle, and even patient. His quickness showed itself as much in his power of applying, as in his power of grasping, principles, and as much in expression as in conception. These qualities were invaluable to him as a journalist. They enabled him, whatever might be the subject on which he wrote, to see at once with intuitive quickness exactly what he had to say, and to say it in language almost mathematically accurate.

'These qualities were remarkable enough to secure a considerable success in life. But in him they were combined with others rarer and more remarkable—qualities for which journalism gives comparatively little scope, but which are essential to the more permanent forms of literature. These Sir Henry Maine possessed in the highest degree, and employed upon a branch of knowledge which he may almost be said to have called

into existence, at least in this country. As a lecturer and as an author on subjects connected with the origin of laws and the history of the early forms of political institutions he was as successful as he was in journalism. His powers as a lecturer were remarkable; but of course his, like all other lectures carefully prepared beforehand, and not illustrated by experiments, were open to the remark that, when all was said and done, they were like—and indeed, actually were to a great extent—chapters of a book read aloud. Their importance is shown in the books which give their results in a condensed form. This is not the place for the discussion of their contents; but it may be said in general that their great distinguishing characteristic is that they were written as if by inspiration. Their author had a power of seeing the general in the particular which we do not think has been equalled in literary history. His works are full of generalisations which are as remarkable for their clearness and sobriety as for their intrinsic probability, and which were reached, not by any very elaborate study of detailed evidence, but by a kind of intuition. He seemed to see things "in their quiddity," and to reconstitute them from fragments with the genius of Owen or Cuvier. In his "Asiatic Studies" Sir Alfred Lyall gives striking instances of this from his speculations on the origin of clans. Sir Alfred found in Rájputána the precise practices which Sir Henry Maine had suggested as a possible explanation of some scattered facts which he had noticed in his reading.

This quickness of apprehension, power of expression, and luminous intuition would perhaps lead an uninformed observer to the conclusion that their possessor had the temperament of a poetical enthusiast. No greater mistake could have been made. They were associated with a temperament which was liable to err on the side of caution, regard to actual circumstances, and to immediate practical consequences, and a total absence of any sort of enthusiasm or illusion. In his third profession, that of a statesman, these qualities were conspicuously displayed. Sir Henry Maine never made a mistake in his duties as an adviser of the Government of India. He was wise, calm, cautious, and reasonable to a degree of which

it is difficult to give any adequate notion. He was sometimes charged with idleness in India, and it is no wonder that the charge was made in a country where the standard of industry is so high as to be apt to demand unremitting drudgery, and where more valuable and rarer qualities are apt to be regarded with cynical suspicion and ignorant contempt. Sir Henry Maine undoubtedly did not work so hard as many of his colleagues; but there was probably not one of them who could have done at all what he, whenever called upon, did supremely well.

'It is difficult to speak of his moral and personal qualities. He was not a man of wide popular sympathies, nor was he ever called upon to enter into any of the conflicts which attract much public attention; but to the few who knew him really well he endeared himself to an extent which it is impossible to describe without entering upon matters with which the public has no concern. There are persons to whom the world can never have the same aspect again as it had when he lived in it.'

I can add nothing to this, which contains, indeed, all that it is really important to know of Maine outside his writings, into which he put the expressed essence of himself. These, however, may be read with more interest by persons who, assisted by such a clue as I am attempting to furnish, can fit them into the various periods of his activity from his academic preludings, through his professorial and journalistic beginnings, to his career as a jurist, statesman, and publicist. His life was a drama in five acts, Cambridge, London, India, London and Oxford, London and Cambridge; but it was a drama with no exciting scenes or startling incidents. The one circumstance in it of an unusual character was that a man of such fine and peculiar powers, one so unlike the ordinary successful lawyer, should have early attracted the attention of a Minister able to place him at once in a high position. That piece of good fortune fell to Lord Halifax, advised perhaps by Herman Merivale—a personage of rare and

brilliant ability, who died almost unknown to his countrymen, but who was a great power, first in Colonial, and then in Indian, affairs for many years of this century. However that may be, the excellent man and able administrator who was then Secretary of State for India, and was responsible for the appointment, never did a better day's work than when he sent to India a Member of Council so fitted to bring to the government of that country just the kind of insight which the Indian services, filled as they are with men of ability—how filled no one knows till he has had to work with them—have so seldom been able to supply. The slow irresistible pressure of Law is the strongest British influence now working in India, and Maine, from 1862 to his death, had more to do than any other single man, I will not say with making Indian law, but with determining what Indian law should be. That and the new spirit which he breathed into juridical studies in England, and to some extent in other countries of the West, are his chief titles to the remembrance of posterity. His published works are in the hands of all who care for the studies which he cultivated, and the remainder of this volume will be devoted to giving some idea of the nature and extent of his work during the years when he acted directly upon Indian legislation and government, at Calcutta and Simla.

SPEECHES

THE following speeches are taken from the seven volumes of 'Proceedings of the Council of the Governor General of India assembled for the Purpose of Making Laws and Regulations,' published by the authority of the Governor General, at Calcutta, in the years 1863 to 1869. Most of them were reported, by Mr. Maine's desire, in the *oratio obliqua*; but a few, of exceptional importance, are given exactly as they were delivered. All were revised by Mr. Maine in proof. They are arranged chronologically, except in one or two cases where it seemed desirable to bring together speeches dealing with the same or a similar subject. For a like reason, a minute on specific performance of contracts comes immediately after a speech on the same matter, and a speech and a minute on over-legislation have been placed together.

BREACHES OF CONTRACT COMMITTED IN BAD FAITH

DECEMBER 17, 1862.

THE Natives of India, like some European races, have two standards of morality, one used among themselves, the other between themselves and foreigners. The former standard is fairly high, witness the rarity of a dishonoured hundí.[1] The latter is decidedly low, and one of the many difficulties with which the Indian legislature has had to cope arises from the tendency of Natives to break their contracts with Europeans after having received payments in advance or other consideration. The ordinary civil remedy by the award of damages is in most of these cases utterly useless. In 1859, therefore, an Act was passed to provide for the punishment of such fraudulent breaches by imprisonment; but it applied only to artificers, workmen, and labourers, and its local extent was limited. In 1861 Mr. (afterwards Sir Cecil) Beadon brought in a Bill with a similar object, but it applied only to agricultural contracts, as, for example, when a ryot

[1] A kind of bill of exchange used by Native bankers and merchants.

agreed with the owner of an indigo factory to plant land with indigo, and received an advance to enable him to do so. This Bill was, moreover, withdrawn at the instance of the Secretary of State, mainly on the ground that 'it dealt with breaches of a civil contract in a criminal way.' In the following year Mr. W. Ritchie, Sir Henry Maine's predecessor as Law Member of the Governor General's Council, introduced a Bill providing that when any defendant had received consideration for any contract and broken it, the Court, if it found that the contract had been broken in bad faith and without reasonable excuse, and if the damages were not paid, might commit him for a certain period to gaol, where he should maintain himself or be kept to hard labour. This measure had the approval of the late Sir Barnes Peacock. However, Sir Charles Wood, then Secretary of State for India, sent out a despatch to the Government of India expressing a hope that the Bill would be withdrawn, and intimating a doubt as to the expediency of any legislative interference in commercial transactions with the view of coercing one of the parties to a contract. The select committee to which Mr. Ritchie's Bill was referred recommended that it should be dropped. The first important duty which Mr. Maine had to perform as Law Member was to support their recommendation. This he did in the following speech:

The Honourable Mr. Maine moved that the report of the select committee on the Bill relating to breaches of contract committed in bad faith be taken into consideration. In making this motion, he begged to offer a few words on the reasons which had led the committee to the conclusions of the report; or, rather, he should perhaps say, on the reasons which had led himself; for it was possible, and indeed probable, that different members had reached the same conclusions by different routes. It would be seen that, in the despatch from the Secretary of State for India which was printed with the papers accompanying the Bill, the Secretary of State expressed a hope that the Bill would be withdrawn, and then intimated a doubt whether any legislative interference in commercial transactions, with the view of coercing one of the parties to a contract, could be productive of good. The language of the Secretary of State was not directly imperative, and, on the whole, for various reasons, the committee thought it their duty to consider the possibility of amending the Bill, and if he (Mr. Maine) individually might avow any other motive besides the wish that a subject of such great importance

should meet with full discussion, it would be the desire that no measure introduced by the late Mr. Ritchie should be lightly thrown aside.

It would be better first to consider the Bill apart from the objections of the Secretary of State. The Council would remember that Mr. Ritchie introduced it avowedly as a measure of compromise. Mr. Maine inferred, from the language which Mr. Ritchie used in the debate on its introduction, that he would have preferred a Bill like that brought in by the present Lieutenant Governor of Bengal, a measure, that was to say, making breaches of contract criminally punishable, but more general than Mr. Beadon's Bill, which applied only to contracts for the delivery of agricultural produce. The Secretary of State, as was well known, announced his intention of disallowing the first Breach of Contract Bill, and hence Mr. Ritchie was compelled to confine himself to a Bill prescribing a proceeding of a civil nature in point of form, but of a criminal nature in respect of the penal consequences incurred by an unsuccessful defendant. Mr. Maine thought, however, it would always be found that, when you were dealing with a distinction so old and so universal as that which separated criminal law from civil, it was not possible to mix together the provinces of jurisprudence which lay on either side of the boundary, and that you would be obliged to take up a position on one side of the line or the other. It was his strong impression that, if the committee had felt there was any use in amending the Bill, it would have emerged in a shape closely resembling that of the measure introduced by the Lieutenant Governor; for, when they came to the examination of details, and attempted to put the machinery of Mr. Ritchie's Bill into working order, they would have found it defective in one respect, in the omission of provisions for sufficiently full notice to the defendant of the character of the charge brought against him. It would have been contrary to all principle—and, as it struck him, to one's most elementary instincts of justice—to inflict a penalty so severe as hard labour on a man who had not been amply warned before the trial commenced that he would be exposed to this consequence if he did not succeed in rebutting the accusation of fraud. No civilised

nation, so far as he was aware, had ever relieved an accuser from the duty of giving this warning. A French act of accusation was a voluminous history, not only of the alleged offence, but almost of the whole life of the accused, and, in England, until comparatively recently, the law was so anxious that prisoners should come into court with full preparation, that a large percentage of persons accused escaped scot-free for want of a precise description of the charge in the indictment.

The committee, therefore, if it had amended the Bill, had two courses open to it. Either it must have compelled the plaintiff, in such a proceeding as the Bill contemplated, to put into the pleadings a full account, with all particulars of mode and time, of the fraud with which he taxed the defendant, or else it must have been provided that, whenever in the course of a civil suit for breach of contract it became clear that the question of fraud would be raised, the proceedings should at once be interrupted, and the accused bidden to attend on a subsequent day, with his means of disproof, if he had any. In the first case, the inquiry would differ only in name from a criminal trial; in the second, it would be a criminal investigation added on to a civil suit.

He had attempted to show that legislation on that subject would necessarily, in the long run, turn out to be criminal legislation, because it explained the stress laid by the committee on the passage in the despatch in which the Secretary of State objected to any inquiry into the motives of the defendant, and into the reasonableness or otherwise of his excuses for non-performance. It was scarcely necessary to point out to the Council that such an inquiry was, in fact, the great characteristic which distinguished the administration of criminal law from the administration of civil law. In the assessment of civil penalties, no excuse could be listened to; if the suit were for breach of contract, the only question was, whether the contract had been performed: if it had not been performed, though even through the most unmerited misfortune, the full consequences of non-performance must follow without abatement. But, under criminal law, whether an act drew down a penalty at all depended entirely on the motive with which it had been done; and he ventured to say that there was not

one act of which criminal law took cognizance which, if the motives of the actor shaped themselves in a particular way, or lent themselves to a particular excuse, might not become justifiable and even laudable. For these reasons the Council would not, he thought, fail to come to the conclusion that, when the Secretary of State objected to an inquiry into motives, he objected not only to Mr. Ritchie's Bill in its present shape, but in any shape it could possibly assume.

Then came the question, how far beyond this did the objections of the Secretary of State extend. He understood the Secretary of State to object to all general criminal legislation against breaches of contract. But comparing the language of this despatch with that of former despatches on the same subject, he did not understand him to object to particular legislation. He meant by particular legislation, legislation directed to the enforcement, by the authority of the magistrate, of a certain class of contracts, or of contracts between persons belonging to a particular class. There were, he believed, samples of such legislation in the jurisprudence of every country. In England there was the statute, or rather the series of statutes, regulating the relations between employers and labourers, and the statute which applied to merchant seamen. In India they had the Calcutta Artificers' Act,[1] and there had been many laws and regulations of that kind which had expired or had been repealed. In all this legislation, there seemed to be little question of motive. Breaches of contract by persons falling under these statutes did not appear to be criminally punished on account of their peculiar immorality, for it would be absurd to maintain that a breach of contract by a mariner is more immoral than by anybody else; but, as Mr. Maine supposed, the legislator took his stand on the interests of society, and declared that society could not afford to allow these particular contracts to be lightly broken. Of course, such legislation must always be sparingly resorted to, and only on the clearest grounds; both because it was exceptional, and because it rested on a ground (the interest of society) which had always furnished the greatest number of pretexts for tyranny. But still, in spite of all its disadvan-

[1] Act XIII. of 1859.

tages, he confessed that he infinitely preferred particular to general legislation on these subjects. Of course, general legislation had advantages of its own. If you wish to conceal your true object, you can do it much more easily by general legislation than by particular legislation. If you wish to avail yourself of broad general propositions about the duty of punishing fraud, wherever it may be detected—propositions which it was extremely invidious to deny, and extremely dangerous to affirm—you can call them to your aid much more effectually when you are meditating general legislation. But in particular legislation you have this compensating advantage, that you know where you are going to. You can measure the consequences of the steps you take, and you can retrace them if they disappoint you. If he felt himself called upon, which he did not, to raise objections to Mr. Ritchie's attempt at general legislation, he should rest his doubts less on the grounds urged by the Secretary of State, than on grounds which it was not easy to describe in precise language. He should deprecate such legislation less on account of results he foresaw, than on account of results which he did not and could not foresee. Knowing, as they all did, that all the modern progress of society seemed to be intimately connected with the completest freedom of contract, and in some way almost mysteriously dependent on it, he should shrink from tampering with so powerful an instrument of civilisation; and if he were unfortunately compelled to propose a measure like Mr. Ritchie's, he should feel like a physician employing a remedy which might indeed cure the disease, but which might also revolutionise the constitution. There were no such dangers as these attending particular legislation. In that, as you must always be aware that the measures you contemplate are irregular and exceptional, you are likely to assure yourself before you interfere, that a case has been established for interference. When you do make up your mind to use your remedy, you can exactly proportion it to the evil which has to be removed: and as the sphere of its operations would probably be limited, you can judge and observe of its working. It was not for him to say what legislation of the kind he had been describing was called for by the circumstances of particular

localities in India, or by the practices and habits of particular classes; but if exceptional measures had to be resorted to, and they were of that nature, he should think that they could secure what, no doubt, was one of the most efficient means of moral education—the exact performance of contracts—without disturbing principles and distinctions which had been established for so many centuries, and which seemed to strike root the deeper as the world grew older.

DIVORCE

DECEMBER 24, 1862: JANUARY 14, 1863: FEBRUARY 26, 1869.

THE next three speeches relate to a Bill, framed by Mr. Whitley Stokes, the object of which was to confer upon the High Courts in India a jurisdiction similar to that exercised by the Divorce Court sitting in London. The Bill was passed as Act IV. of 1869, *to amend the law relating to divorce and matrimonial causes in India*. It extends to India the principal provisions of 20 & 21 Vic. c. 85, as amended by 22 & 23 Vic. c. 61, 23 & 24 Vic. c. 144, and 29 Vic. c. 32. It also embodies many rulings of Sir Cresswell Cresswell and Lord Penzance.

Mr. Maine moved for leave to introduce a Bill for conferring upon the High Courts of Judicature in India the jurisdiction and powers vested in the Court for Divorce and Matrimonial Causes in England. He said that the object of the Bill was to give effect to the policy embodied in the High Courts Act passed in 1861,[1] and to the Letters Patent issued by Her Majesty for constituting the High Courts. The object of the High Courts Act seemed to have been, not so much to create new branches of jurisdiction, as to constitute and re-distribute the power which already existed. The 9th clause gave power to Her Majesty to confer on the High Courts such matrimonial jurisdiction as she thought fit; but following the principle he had mentioned, Her Majesty did not attempt to confer on the High Court such a jurisdiction as was exercised by the Divorce Court in England. The Secretary of State therefore requested the Governor General to introduce a measure, conferring a jurisdiction on the High Courts here similar to that exercised by the Divorce Court sitting in London.

[1] 24 & 25 Vic. c. 104.

The course pursued was probably the only one which could have been followed under the circumstances. But it had given rise to a peculiar difficulty, which had been the cause of some delay in introducing this Bill. The matter was so delicate and important, that even before the text of the Bill was in the hands of the members, he would state what that difficulty was. He need not say that, before such a Bill as this was brought in, deeply concerning the High Court of Bengal, it was submitted to the judges of that tribunal. The Government were in possession of their answers, and two of the judges of the High Court had given specific opinions on the point to which he had referred. They called attention to its being doubtful whether, if the High Court, acting under the authority conferred by the Council, decreed the dissolution of marriage between persons belonging to a certain class of Her Majesty's subjects in India, there was anything in the present state of the law which would compel the English courts to recognise those decrees, and to view the marriages put an end to as legally dissolved. One learned judge (Mr. Justice Norman) was on the whole of opinion, that a decree of the High Court dissolving a marriage would now be recognised in England. The Chief Justice,[1] however, considered it more than doubtful whether such decrees would be allowed by the English courts to have this consequence; and though no concurrence of his (Mr. Maine's) could add weight to the opinion of Sir Barnes Peacock on this point, he must say that ever since he had tried to address himself to this subject he had been struck with the same difficulty.

He would attempt to explain what this difficulty was. There was no doubt that the rule of private international law, the rule received among communities under what was called the comity of nations, was that every man's status, his personal condition, was to be determined by the law of his domicile, of the country in which he was domiciled; so that a man who was a major or minor, or bachelor or divorced man, in the place where he had acquired a domicile was a major or minor, and so forth, in every other country. Of course the highest authority by which a man's status could be declared

[1] The late Sir Barnes Peacock.

in any country was the authority of a court of competent jurisdiction, and hence it followed that all tribunals were bound by the comity of nations to respect and recognise the decrees of divorce passed by foreign courts. Now, then, as the courts of every dependency of the British Crown, which had a complete and independent judicial system, are foreign courts relatively to the English tribunals, it would seem that a decree of the High Court dissolving a marriage between domiciled Christians under the measure now to be introduced ought to be deemed effectual by every English tribunal; and that such a decree would be regarded as valid in respect of one class of Indian Christians there seemed to be no doubt. When persons had been married in India, and the marriage had been dissolved by the High Court, no difficulty existed, and the dissolution would be held to be complete even in England. But when persons had been married in England, and their marriage had been dissolved in India, it was far from certain that English tribunals would consider them at liberty to re-marry. The doubt had been caused by a judicial decision which had become memorable in that branch of jurisprudence, and which was known as *The King* against *Lolley*, or Lelly's case.[1] Lolley, in 1812, was indicted for bigamy, and he pleaded in defence that his first marriage was dissolved by a Scotch decree. All the twelve English judges held that such a dissolution was of no validity in England; and Lolley, who had been convicted, underwent the punishment to which he had been sentenced. The decision was, as he had heard, consonant with the prevalent feeling of the time, for much anxiety had been caused by the apparent facility with which divorces were obtained from the consistorial branch of the Scottish Court of Session; but at the same time it was in flagrant discordance with the rule of private international law. Hence, a long succession of the best legal authorities had expressed dissatisfaction with Lolley's case,[2] or had attempted to explain it away. Some, with whom Mr. Justice Norman was disposed to agree, had pointed out that

[1] 1 Dow, 124, 136; Russ. & Ry. C. C. 236.

[2] See in the United States, Kent's *Commentaries*, 12th ed., vol. ii., pp. 110, 111, 117.

the decision turned partly on the circumstance that marriages at common law in 1812 were incapable of dissolution ; so that, the law being now otherwise, the case had lost its authority. Others, including the judge of greatest experience in matrimonial law, Dr. Lushington, had observed that the judges in 1812 did not seem to have paid attention to the question of domicile. But on the whole, he ventured to think that the better opinion was Sir Barnes Peacock's, who considered that, so long as Lolley's case was not formally overruled, it was impossible to say that persons married in England and divorced in India would be regarded in England as capable of contracting a legitimate re-marriage.

This case, too, as the Council would see, was one in which doubt was almost as intolerable as unfavourable certainty ; for doubts as to the validity of divorces were doubts as to the lawfulness of re-marriage ; doubts as to the lawfulness of re-marriages were doubts as to the legitimacy of children ; and doubts as to the legitimacy of children were doubts as to the right of inheritance ; so that these difficulties, if not set at rest, might lie in ambush for the third and fourth generation, and fifty or sixty years hence the right to an estate might be impeached on account of an unsettled question respecting an Indian divorce.

The question therefore was, what course ought they to adopt in legislating on these subjects. There could be no doubt that, as they were competent to legislate for a large class of Christian subjects, those who had been married in India, they should not delay the relief they could give to such of them as were unfortunate enough to be compelled to resort to the new branch of the High Court. Meantime, the Governor General in Council had requested the Secretary of State to lay the difficulty before the law-officers of the Crown. If they, considering the criticisms which had been directed against Lolley's case by so many learned persons, were of opinion that it was originally decided erroneously, there would be reasonable security for persons married in England who might re-marry after a decree of divorce by the High Court. If they thought that Lolley's case still stood in the way, the Secretary of State would doubtless think fit

to apply to Parliament for a remedy, which might take either of two forms suggested by the judges of the High Court. Indian divorces might be rendered, simply and at once, as binding in England as divorces by the English Divorce Court, or they might be registered there, and if not appealed from within a certain period they might acquire the validity of an English matrimonial decree.

JANUARY 21, 1863.

Mr. Maine introduced the Bill, and moved that it be referred to a select committee.

He said that, in introducing this Bill, he ventured to think that he anticipated the wishes of the Council by offering no arguments in support of the principle upon which it was founded. Whatever were the difficulty of the questions involved in the establishment of a tribunal having power to decree a divorce *a vinculo matrimonii* (and he would be the first to admit that the difficulty of those questions was only equalled by the difficulty of discussing them satisfactorily in a deliberative assembly), he assumed that the Council would be of opinion that, so far as they related to principle, they had been solved in England for good or for evil. He imagined that those who had the strongest doubts of the policy of this measure, whether on grounds of public morality or expediency, would still feel that the privilege of suing for a dissolution of marriage should not depend on an accident of locality, and that nobody would wish to perpetuate the exceptional disabilities under which the Queen's subjects in India were placed in respect of matrimonial law.

There were, it should be stated, some reasons why the Council should approach the subject with less misgiving than they would probably have felt if they had been asked to legislate within a shorter period after the creation of the English Divorce Court. They came to it with the advantage of English experience. It would be vain to deny that some of the earlier effects of the establishment of the new tribunal were such as to distress, and perhaps to alarm, the public feeling of England. The number of applications for relief on

the files of the Court seemed at first enormous; the scandal occasioned by the publication of its proceedings was far beyond all previous anticipations. These evils, however, at least in their excess, proved to be only temporary. It was shortly proved that the multitude of cases submitted to the Divorce Court arose from the accumulations of past years, and that the earlier petitioners were almost invariably persons whom the costliness and cumbrousness of the old procedure in divorce had discouraged and debarred from relief. It was only quite recently that what might be called the normal statistics of the English tribunal had been disclosed, and there was much reason to believe that the annual growth of cases of this description would not be extraordinary, and that, though greater than could be wished, it was not greater than might be expected. The other evil, the scandal attendant on publicity, had been, it was only just to say, very greatly abated by the good taste and good feeling of English newspapers, which, co-operating with general sentiment, had reduced the reports of these cases within the narrowest limits compatible with publication. It was probably well known to the Council that the public scandal it occasioned was, for a long time, considered to be the most unfortunate incident of the Court, and an amendment to one of the supplemental Bills, providing that it should sit with closed doors, was, if he remembered rightly, lost by a narrow majority in the House of Commons.

It might be asked why, with English experience to guide them, they had not thought of engrafting some such provision on this Bill. He was, however, one of those who thought that there was always the strongest presumption in favour of that perfect publicity which was the oldest characteristic of the administration of English justice, and in this case experience had, to a great extent, borne out the antecedent presumption. For the publicity given to those cases, though it no doubt had its questionable aspect, had been the means of protecting society in England against one of the dangers with which it was menaced by the change in the law. It had rendered connivance or collusion between the petitioner and respondent in a divorce suit, if not impossible, at all

events, excessively difficult. However carefully and dexterously the plot might have been laid, it rarely happened that some one was not cognisant of a circumstance which showed the understanding between the conspirators, and the chances were that the attention of the person so cognisant was attracted to the report of the proceedings. It soon became known in England that information of the kind was easily procurable, and to take advantage of this information, one of the last and most valuable of the Divorce Acts was framed. By this Act it was provided that the original decree of the matrimonial court was to be only provisional; in technical phrase, a decree *nisi*; and before it was made absolute the Queen's advocate and the Queen's proctor were permitted to intervene in the proceedings, showing cause why it ought not to be passed. The ground of their intervention was to be connivance, or collusion, and for the information which caused them to move they were indebted to the publication of the proceedings on the first hearing. The Government of India had incorporated this Act with this Bill, substituting only the Advocate General and the Solicitor to Government, for the Queen's advocate and Queen's proctor.

The Bill, he might now mention, followed very closely the English Acts, consolidating into one measure the body of English statutory matrimonial law. In one point only it was proposed to depart from the tenor of the English Acts. In conformity with the practice of the High Courts when exercising original jurisdiction, and with the approval of the great majority of the judges of those courts—of all the judges indeed, with one exception—they proposed to omit the provision of the English Acts for the trial of question of fact by jury at the option of the parties to a divorce suit. There did not seem to be sufficient reason for placing matrimonial suits on a different footing from other civil proceedings in India. He would not have adverted to the point if one of the judges of the High Court of Bombay—the only judge, he might remark, who was opposed to the Bill on principle—had not stated that he saw no reason why the English system of trial by jury in divorce cases should not be adopted in India. He (Mr. Maine) must observe, however that in adopting the system

of inquiry practised by the Indian Supreme Courts, they certainly, if he might so speak, anticipated the results towards which English experience in this matter seemed to be pointing. It was true that the English Divorce Acts conferred on either of the parties the power of demanding a jury if they thought proper; but the reason of this probably was that the English judge of the Divorce Court had no power of assessing damages. The proceedings before the Divorce Court took the place, under the recent statutes, not only of the investigation which used to take place before the House of Lords, and of the inquiry before the Ecclesiastical Court, but also of the action for criminal conversation in which damages were recoverable. Still, though the judge of the Divorce Court in England had no power of assessing damages without a jury, the fact was, that the demands for juries on the part of the litigants were steadily diminishing, and the vast majority of cases were probably now tried by the judge solely. Nor was it an immaterial consideration that the duty of serving on juries in the Divorce Court was regarded with the utmost repugnance by the gentlemen liable to it, and no small difficulty was practically experienced in completing the requisite number. He was disposed also to attach great weight to that stricter decorum which it was always possible to observe when these cases were tried before a judge, than when they were investigated, necessarily with much greater fulness, before a popular tribunal. These reasons would, he trusted, be thought by the Council to justify the Government in taking the course recommended by the majority of the judges, rather than that suggested by the Chief Justice of Bombay.

There were many other points on which opinions were expressed by the learned judges of the various High Courts, but these were points of detail which would more fitly be considered by the select committee. The only remaining observation he had to offer was, that the scheme of the Bill was this: it was accommodated to the existing matrimonial jurisdiction. Whatever were the limits of the matrimonial jurisdiction which the High Courts had inherited from the Supreme Courts, to those limits would extend

the new power of decreeing dissolution of marriage. The Bill would necessarily be delayed on account of the legal difficulties which he mentioned on a former occasion.

FEBRUARY 26, 1869.

Mr. Maine moved that the report of the select committee on the Bill be taken into consideration. He said:

This measure is obviously one of great social importance; but I do not think I need trouble the Council at any wearisome length with an analysis or description of its provisions. It is substantially a consolidation measure. It puts together the English statute-law on the subject in a more orderly form, and, I trust, in clearer language, and it incorporates the principal recent decisions of the Divorce Court. But in the main its principles are those of the statutes regulating the jurisdiction of the English Court of Divorce and Matrimonial Causes. I shall therefore probably discharge my duty to the Council by calling its attention to the points in which the Bill differs from the English law, and to the provisions in it which are specially characteristic of India.

The first important section which requires remark is the second. In connection with it, I will take leave to remind the Council of the history of the Bill. It has been seven years before the Council of the Governor General. On examining the parliamentary debates upon the English Divorce Act, I find it was then distinctly contemplated that a measure of divorce relating to India should be passed either in India or at home. The Secretary of State appears to have preferred Indian legislation, and directed the Government of India to submit to this Council a Bill corresponding with the English Act. It was in Sir H. Harington's hands when I came out here in 1862, and he transferred it to me. But I did not carry it through more than a single stage on account of the doubts which I felt myself, and which were strongly stated by some of the judges, as to the power of this legislature to enable the courts to decree divorces of persons married in England which the English courts would recognise. Though the matter is somewhat technical, I must

attempt to explain to the Council what the legal difficulties were. At that time the opinions of lawyers were much divided as to the relative authority to be attached to two cases which have become famous in connection with this subject. *Lolley's case*, which is considerably the older of the two, was as follows:—Lolley was a man who married a wife in England and took her to Scotland, where he obtained, or rather forced her to obtain, a divorce from the Scottish consistorial court on the ground of his adultery. He then returned to England and married again. Afterwards he was indicted for bigamy and convicted, the point whether he had been legally divorced being at the same time reserved for the consideration of the judges. The judges decided that the conviction must stand, in terms which were long considered to establish that a foreign court could not dissolve a marriage that had been solemnised in England. Long afterwards, in 1835, the House of Lords decided the case of *Warrender* v. *Warrender*.[1] Here the appellant and respondent, Sir George and Lady Warrender, had both a Scottish domicile, but the marriage had been celebrated in England and the adultery was alleged to have been committed in France. Lord Brougham gave judgment in terms which would appear to sanction the rule which seems to be the general rule of private international law, that personal status follows domicile, and that the question whether a man is a minor, or a married man, or a divorced man is to be determined by the law of the country in which he is domiciled. Lord Brougham, who had been counsel for Lolley, spoke in *Warrender* v. *Warrender* with much doubt of the authority of *Lolley's case*, and it might almost be considered to have been overruled, if it had not been for the observations of Lord Lyndhurst, who followed Lord Brougham, and who, while agreeing with the decision of the House, stated that he did not intend in any way thereby to throw discredit on the older decision. Hence lawyers had to decide between two decisions which are certainly difficult to reconcile.

The Government of Lord Elgin wrote to the Secretary of State, who admitted the weight of the doubts which had been

[1] 2 Shaw & Maclean, 189; 9 Bligh, 89.

felt in India, and stated that Her Majesty's Government would bring a Bill into Parliament. After waiting two years, Sir John Lawrence's Government, which had been much pressed by the applications of East Indians for relief, begged the attention of Her Majesty's Government to the subject, but was told that a royal commission was about to be appointed at home to investigate the whole subject of marriage and divorce in India and the colonies, and that there could be no English legislation till its report had been received. Another interval of two years occurred, and the Government of India again pressed the subject on the Queen's Government. They were told in reply that the commission had found the subject of marriage so difficult that there was no near prospect of their entering upon that of divorce. We were therefore requested to legislate to the extent of our power, or in other words to exclude from our measure persons who had been married in England, large and increasing as the class appeared to be. In this rather unsatisfactory state of things the select committee recommenced its labours, but it turned out that, just at the same time, the House of Lords was giving a decision which appeared to incline the balance against *Lolley's case* and in favour of the doctrine of *Warrender* v. *Warrender*. This was *Shaw* v. *Gould*.[1] Here the judgments of Lord Cranworth and Lord Westbury appeared to lay down the law in much the same terms as Lord Brougham—that a foreign court could dissolve an English marriage when the parties were domiciled abroad.

Section 2 of the Bill, however, does not make it a condition of jurisdiction that the petitioner should be domiciled, and it is with a view of explaining this omission that I have made this long statement. In the first place, though a man's domicile of origin is easily proved, a new domicile is proverbially difficult to establish. It depends partly on length of residence in the foreign country, partly on intention to stay there. I myself heard the present Lord Chancellor, Lord Hatherley, describe domicile as a function of time and intention, and when an eminent judge defines it in terms half mathematical and half metaphysical, it may readily be inferred

[1] L.R. 3 H.L. 55, 92, 93.

that it is not a thing easy to be proved. Moreover, as the House of Lords has recently remarked, the question of domicile hardly ever arises with regard to living persons. Now, not only will the persons who will petition under this measure be living, but they will have a clear intention of not staying permanently in India. A still further perplexity arises from the fact that the substantive law of domicile in India has recently been altogether changed. The following are the provisions of the Indian Succession Act [1] on the subject of new domicile :—

'A man acquires a new domicile by taking up his fixed habitation in a country which is not that of his domicile of origin.

'*Explanation.*—A man is not to be considered as having taken up his fixed habitation in British India merely by reason of his residing there in Her Majesty's civil or military service, or in the exercise of any profession or calling.

'Any person may acquire a domicile in British India by making and depositing in some office in British India (to be fixed by the local government) a declaration in writing under his hand of his desire to acquire such domicile, provided that he shall have been resident in British India for one year immediately preceding the time of his making such declaration.'

Now this domicile under the Succession Act is a forensic domicile. It is a domicile artificially created as a foundation for rights and remedies. But it is not the domicile of private international law, nor is it the domicile spoken of by Lord Brougham, Lord Cranworth, and Lord Westbury. The difficulty is so great that the select committee might have found it insuperable but for Lord Colonsay's modification of the law as laid down by the other law-lords in *Shaw* v. *Gould:*

'It was said that a foreign court had no jurisdiction in the matter of divorce unless the parties are domiciled in that country ; but what is meant by "*domicile?*" I observe that it is designated sometimes as a *bonâ-fide* domicile, sometimes as a *real* domicile, sometimes as a *complete* domicile, sometimes as a domicile *for all purposes.* But I must, with deference, hesitate to hold that on general principles of jurisprudence, or rules of international law, the jurisdiction to redress matrimonial wrongs, including the granting of a decree of divorce *a vinculo,* depends on there being a *domicile* such as seems to be

[1] Act X. of 1865. The sections cited in the text are numbered respectively 10 and 11.

implied in some of these expressions. Jurisdiction to redress wrongs in regard to domestic relations does not necessarily depend on domicile for all purposes. If the decisions to which I have referred proceeded on the ground that the resort to the foreign country was merely for the temporary purpose of giving to the courts of that country the opportunity of dealing with the case according to their own law, and thereby obtaining a dissolution of the marriage, and that such was the object of both parties, these decisions might be said to derive support from principles of general law, on the ground of being *in fraudem legis*. But if you put the case of parties resorting to *Scotland* with no such view, and being resident there for a considerable time, though not so as to change the domicile for all purposes, and then suppose that the wife commits adultery in *Scotland*, and that the husband discovers it, and immediately raises an action of divorce in the court in *Scotland* where the witnesses reside, and where his own duties detain him, and that he proves his case and obtains a decree, which decree is unquestionably good in *Scotland*, and would, I believe, be recognised in most other countries, I am slow to think that it would be ignored in *England* because it had not been pronounced by the Court of Divorce here.'

I apprehend that Lord Colonsay has here described with exactness the position of Europeans in India. They are resident here, but their residence falls somewhat short of domicile: their duties keep them here, and under the provisions of the Bill they can only invoke the new jurisdiction when the adultery is committed in India. I have much confidence that the English courts will recognise Indian adjudications under this measure. There seems to me to be much weight in the dictum of a high authority, Dr. Lushington, in *Conway* v. *Beazley*.[1] He doubted

'whether it was the intention of the judges to decide a principle of universal operation absolutely, and without reference to circumstances, or whether they must not, almost of necessity, be presumed to have confined themselves to the particular circumstances that were then under consideration.'

The truth is that the hesitation of English judges to recognise foreign divorces has manifestly arisen from the fact that the divorces before them had in all cases been Scotch divorces, from their feeling that Scotland was very near to England, and perhaps from a suspicion that, as Scotch mar-

[1] 3 Hagg., Eccl. 642.

riages are easily contracted, so Scotch divorces are easily obtained. But let the Council consider whether the sort of divorce to which the English courts are likely to object can be obtained in India under this measure. First of all, the parties must come to India, which is a very different thing from going to Scotland; then the adultery or other offence must be committed in India. In a case of an improper divorce there would almost inevitably be collusion or connivance, and, moreover, collusion or connivance under very suspicious circumstances. All the careful machinery of the Bill for the detection of these would come into play, and the judgment of divorce would never be given. So much for persons married in England. Over all the other classes indicated in section 2, we have power to give the courts a complete jurisdiction.

Section 4 raises a question which I will not call doubtful, but upon which some of the persons who have addressed the committee are divided. It is the question whether the District Courts shall be allowed a jurisdiction in divorce. The main reason why the select committee had given this jurisdiction, was that the refusal of it would amount to a denial of relief to large classes of persons affected by the Bill. It would be a mere mockery of East Indian clerks in distant cities, and of Native Christians in Mufassal villages, to tell them to come to the High Courts in the presidency towns for judgment of divorce. It is, however, said that the District Courts are not equal to these duties. The argument is one which I look upon with great distrust. If it be established that certain new legal rights and remedies should be created for the benefit of any class of Her Majesty's subjects, and the Indian courts are incompetent to administer them, the proper inference seems to be that the courts should be reformed, not that the rights and remedies should be refused. But the charge is, in truth, often hastily made, and moreover there is nothing specially difficult in questions of divorce. They are important on account of their social importance, but they for the most part involve very simple questions of fact. The Lieutenant Governor of the Panjáb[1] has observed that he

[1] The late Sir Donald Macleod.

does not think that his Deputy Commissioners are equal to the new jurisdiction. He has apparently not noticed that, under the interpretation clause, the District Judge is, in a non-regulation province, a Commissioner, and I really cannot see why the Commissioners in the Panjáb cannot dispose of these cases. Only the other day two gentlemen with military titles decided a case successively, in which the Government were interested to the extent of a million sterling, and in which very difficult questions of public law were involved; and their decree was confirmed by the Chief Court. If, however, it once be granted that the District Courts must have jurisdiction, their exercise of it is by the measure fenced round with many safeguards. The High Courts can call up at any time any case that presents special difficulty. Nor do we provide a mere appeal from their decisions, because the parties may be poor or they may have an understanding with one another, and thus there might be no appeal. We have applied to the decrees of the District Courts the same principle which is applied in India to capital sentences, and have required that they be confirmed by the High Court, which has full powers of calling for fresh evidence. Sir Donald Macleod has also remarked on the provision in section 7, that the principles and rules of the English Divorce Court are to be followed by the Indian judges, and he remarks that the Panjáb officers have no time to master these principles and rules. It is necessary that I should explain that this Bill is substantially a code: it is not easy to conceive a point arising which it will not dispose of. There was, however, no obligation imposed on the committee to construct a code, and therefore it is possible that a question may arise which is not expressly provided for. To meet such a case, it is necessary to indicate the source whence the rules applicable to it are to be taken. There is, however, no more hardship in having to look for that source than in having to search for principles in other departments of law, which the Panjáb courts must constantly be doing. I imagine, too, that any specially difficult case will always be called up by the High Court.

I have some remarks to make on section 10, which I will

postpone ; but I will now call attention to the second clause of the section, which provides that a wife may have a divorce on the ground that since the marriage her husband has exchanged Christianity for some other religion, and has gone through a form of marriage with another woman. The provision has been necessitated by a judgment of the High Court at Madras. The facts of the case are very strange, and are almost as curious an illustration of the effect of our rigid legal ideas upon loose Native notions of custom, as was the discovery which we made the other day as to the state of the law on Native marriages. A Hindú was converted to Christianity, and, as a Christian, married a Christian girl. He then reverted to Hindúism, and it seems to have been found out that he could be readmitted to caste on certain conditions, the principal of which was, as I am informed, that he should submit to have his tongue pierced with a red-hot iron. He then proceeded to marry one or more Hindú wives, and was indicted under the Penal Code[1] for the offence which corresponds with English bigamy. The High Court, however, decided that, having relapsed into Hindúism, he reacquired his rights of polygamy.[2] The Bishop of Madras and the missionaries of Southern India are most anxious that this decision should be set aside by legislation. I apprehend, however, my lord, that, according to the ideas which now prevail as to the almost reverential respect which is due to what a part of the Natives of this country declare to be their custom, social or religious, it is not safe for this Council to revise legislatively the law of the High Court, or to deny the proposition that a Native of India may acquire a right to a plurality of wives through the actual cautery of the tongue. But I think I shall have the whole Council with me in saying that we can and ought to relieve the wife from the marriage bond. It will be allowed that, from the Christian point of view, the husband has been guilty both of adultery and desertion. But the adultery is not legally adultery owing to the decision of the Madras Court, nor is there desertion, since the husband may always say that it is open to the Christian wife to live in his house with the others.

[1] Sec. 494. [2] See *Anonymous*, 3 Mad., H. C. Rep., Ap. 7.

At this point, it is proper that I should advert to an omission which the select committee sanctioned, but which has been much complained of by several ladies and gentlemen who have addressed me in private letters. They ask that what they term 'a validity clause' may be inserted in the Bill. I presume the complaint is that we do not propose to confer on the High Court the special jurisdiction which is vested in the Divorce Court by a separate statute, 21 & 22 Vic. cap. 93. That statute enables the Court to make declarations of the validity or invalidity of a marriage, or of the legitimacy or illegitimacy of children. There is no doubt that, so far as regards that branch of it which relates to marriage, its principal object was to establish marriages of which the validity had been doubted, and thus to quiet scrupulous consciences and to settle rights. It can hardly be said to have been designed as a contrivance for making decrees of nullity on grounds less material than those set forth in the Bill. The select committee considered the matter carefully, and refused to create the jurisdiction out of deference to the authority of Chief Justice Sir Barnes Peacock and Mr. Justice Norman. The latter has given his reasons at length:

'To the question whether it is desirable to add a clause to the Indian Divorce Bill, empowering the courts to make declarations of legitimacy, and of the validity and invalidity of marriages, I would answer in the negative.

'Such decrees would not have an extra-territorial operation. They would not determine conclusively the status of the parties, or be necessarily accepted as binding on English courts with reference to questions as to the inheritance of land.

'The decrees would not be like decrees *in rem*, binding and conclusive on all persons even in this country. The rights of parties not cited would have to be saved, as is done by the 8th section of the 21 & 22 Vic. cap. 93.

'We have in this country considerable experience on the subject of suits for declarations of right. And, for myself, I have no hesitation in saying that such a suit against a person who has no actual present interest in the matter to be litigated, is a very unsatisfactory mode of bringing a question before the court for adjudication. There is sometimes no real contest. The parties against whom the declaration is sought do not feel any deep interest in a question which at the time affects them but very remotely. In such cases, at least, the court

has to act on imperfect information, even if no fraud is practised upon it.[1]

'If the defendants or parties cited do take an interest in the matter, it appears to me that they are subjected to a great hardship in being compelled to litigate, perhaps at great expense, a question in which at the time they have not, and possibly may never have, any actual pecuniary interest, and the answer to which depends on facts of which, in all probability, they have no personal knowledge.'

I have always, myself, ventured to think this jurisdiction of doubtful expediency even in England. There is always danger in enabling a court to exercise its powers when there is not before it any distinct issue or dispute between parties. When, however, it is considered that, were the jurisdiction to be conferred on the High Courts, their decrees would not operate extra-territorially, and a person re-marrying on their authority might be indicted for bigamy in England—when, further, we remember that the witnesses would constantly have to be examined under commission in England, and that the persons who would have to be cited to defend their rights would constantly be living at the other end of the world—there can be little question that the select committee has acted prudently in denying such powers to the Indian courts. In saying this, however, I do not mean to say that several of the letters I have received do not tell a very unhappy story. I can only reply that to give the writers relief does not fall within the principles and purposes of this Bill.

I merely call attention, in passing, to sections 16 and 17, which describe the securities against collusion and connivance provided by the measure. In the case of decrees by the High Court, they are to be in the first instance, as in England, decrees *nisi*, and are not to be made absolute for six months. Decrees for dissolution and of nullity by the District Courts are not to receive confirmation before six months have elapsed, during which interval evidence as to collusion or connivance, if it is forthcoming, can be collected.

There was a slight difference in the committee as to the last clause of section 19, though the dissentients have not

[1] See now the Specific Relief Act I. of 1877, chap. vi., which, with the decisions of the High Courts thereon, contains the present Indian law on the subject of declaratory decrees.

thought the matter of sufficient importance to record their dissent. The High Courts inherit from the Supreme Courts, which in their turn inherited from the Ecclesiastical Courts, a jurisdiction to make decrees of nullity of marriage on the ground of force or fraud. It is very rarely put into exercise. But some gentlemen thought that force or fraud should be specified as distinct grounds of nullity, as is done in the New York code. The objection is that force is quite unknown among Europeans, and equally so among Native Christians. There are many here who can speak with more knowledge than myself on the point. But I am told that what appears to us the extraordinary publicity of Native marriages is a complete security against force. As regards fraud, the select committee would have had a difficult undertaking in hand if it had tried to define the kind of fraud which should invalidate a marriage. Absolute personation of one man by another, which is the only fraud indicated in the Canon Law (from which the jurisdiction has apparently descended), is practically impossible in modern society. As to other kinds of fraud, take a very very strong case. If a ticket-of-leave man comes to India from Australia, and, concealing his antecedents, marries a European woman, is the marriage to be set aside? A more cruel imposition can scarcely be imagined, and yet I apprehend that modern ideas would require the marriage to be maintained. The select committee, however, did not wish to take away from the High Courts any jurisdiction which they at present possess. If those courts are ever called upon to exercise it, they will discover and apply for themselves the proper existing limitations.

Section 21 embodies a limited application of a principle which lawyers would gladly see engrafted on English law. It is the principle that marriages contracted in good faith, but declared to be null, shall be maintained as far as possible. The section, which is taken textually from the New York code, and resembles the provisions of the French code and the numerous systems descended from Roman law, permits the children to succeed as legitimate to the property of the party competent to marry, and thus relieves them, *pro tanto*, from the stigma of illegitimacy.

On sections 56 and 57 it is merely necessary to remark that this legislature has, strictly speaking, no power to limit the appeal to Her Majesty in Council. Practically, however, it is found that the Privy Council will respect the limitation imposed by local legislatures on appeal, when such limitations are reasonable. Section 57 permits the parties whose marriage has been dissolved to remarry if no appeal has been presented to the Privy Council. But theoretically it is conceivable that an appeal might be presented after six months. There is but little doubt, however, that the Privy Council would maintain the restrictions of the Bill under its own rules.

I now return to section 10, of which I have postponed the consideration for reasons which the Council will have divined. The section, with the exception of the clause on which I have already commented, is taken from the English statute, and prescribes the grounds of divorce exactly as they are prescribed in English law. The Chief Justice of the High Court of Bengal has, however, submitted a minute in which he earnestly argues that the grounds of divorce should be enlarged, and that a woman should be allowed to obtain a divorce for the simple adultery of her husband, or, if that cannot be allowed, for his adultery coupled with such acts as, in the judgment of the court, render it improbable that the wife will ever be reconciled to her husband. As the members of Council have doubtless read the paper with all the care demanded by the eminent authority of the writer, I will not read it at length, but will give shortly the substance of the several paragraphs. Sir Barnes Peacock states his opinion to be, that he does not think it either just or politic to allow a dissolution of marriage for adultery of the wife, and not to allow it to the wife for adultery of the husband, however flagrant and however open, and however often repeated, provided it be not incestuous. He points out that this is not only his opinion, but that of many lawyers, jurists, men of the world, and legislators. He remarks on the inconsistency of placing the sexes on equal terms as regards judicial separation, but not as regards divorce. He cites a dictum, that separations without divorces *a vinculo* either condemn to celibacy or lead

to illicit connection. He quotes a contention to that effect in the Marquis of Northampton's case, reported by Bishop Burnet, and a similar argument used in Lord Rous's case. He appeals to an argument of Lord Thurlow in Mrs. Addington's case that, under the Mosaic institutions and the Gospel, a woman might be put away for adultery, and might have similar redress against her husband. He next quotes Lord Eldon's statement that a wife had as good a right as a husband to relief in cases of this description. This statement was made in Mr. Moffatt's case, which was certainly one of extraordinary and cynical depravity in the husband. The lords, indeed, refused the divorce by a majority of sixteen to nine, but Sir Barnes Peacock observes that it would be painful to the judges to have to refuse a decree to the wife under similar circumstances, and that the vote of the Peers could not change the principle. The Chief Justice further observes that the House of Lords had a discretion which is not left to the court under the Bill. He argues that, in a religious point of view, both acts of adultery are equally criminal, and both are alike breaches of the marriage vow if looked at merely as a civil contract. 'A man,' he remarks, 'may live with another woman in an open and notorious state of adultery, revolting to his wife and revolting to society, yet his wife will not be able to obtain a dissolution on account of the adultery alone unless it be incestuous.' Sir Barnes Peacock then shows that Lord Brougham, who spoke and voted against Mr. Moffatt's Bill, had apparently changed his mind in 1838. Lastly, in citing Mr. Battersby's case, Sir B. Peacock remarks that the husband had committed bigamy with his paramour, and his conduct was in other respects most atrocious. 'That case,' he adds, 'is, I presume, the origin of the words in the English Act, followed in section 10 of the present Bill, "or of bigamy with adultery."' I do not at all understand how the bigamy strengthens the case of the wife for divorce. It was said, 'How could a virtuous wife return to the embraces of such a man as Battersby?' In Battersby's case, however, it was not the bigamy which prevented such return.

It will be observed by the Council that these arguments of the Chief Justice are all of a moral nature, and if I were com-

pelled to answer them by arguments of the same character, I freely admit I should have much difficulty in doing so. Doubtless there were members of the committee who denied absolutely that there was any real equality between the sexes in regard to this matter. But, for myself, there is no direct answer to much that is urged by Sir Barnes Peacock, which is thoroughly satisfactory to my mind. The difficulties which I feel in regard to his proposal are difficulties arising out of considerations of expediency, of the peculiar position of European society in India, and of the relation of this Council to the British Parliament. I cannot help asking myself, in the first place, what will be the view taken by English courts of our new system of divorce, if we introduce grounds of divorce wholly unrecognised at home. I have already explained that I attach much importance to Dr. Lushington's declaration, that English judges are greatly swayed by the circumstances under which foreign divorces actually take place. Is there not some risk of our impairing the confidence of English courts in Indian adjudications, if we write on the face of our law that our courts are occasionally to proceed on principles not yet allowed in England? In the next place, I am not without fear that, by giving effect to these suggestions, we might multiply facilities for connivance and collusion; and there is no doubt in my mind that it is the suspicion of connivance and collusion to which is attributable the jealousy entertained by English courts of dissolution of English marriages under foreign decrees. Take the case of connivance. It cannot be denied that the securities against it provided by the English statute are very considerable. In order to procure a divorce, a woman must do that which will for ever exile her from society, and a man must couple his adultery with acts which will bring him under the criminal law, or with desertion which must take him away from all his ordinary duties and employments, or with cruelty which, even if we can conceive the wife assenting to it, is something from which a man of otherwise coarse fibre will surely shrink, or which he will be loath to attribute to himself. Shall we not be materially diminishing these securities, if we allow the divorce to be obtained either for simple adultery, or for

adultery coupled with such conduct as a court may deem to be a bar to reconciliation? These are difficulties which occur to my mind; but they are not the true reasons why I think it would be undesirable to carry out these earnestly urged proposals of Sir B. Peacock, much as we may be disposed to respect his opinion, and little as we may wish to establish any inequitable difference between the sexes.

I must call the attention of the Council to the dates of the authorities cited by the Chief Justice. The Marquis of Northampton's case occurred on January 11, 1548; Lord Rous's in 1609; Mrs. Addison's in 1801; Mrs. Moffatt's in 1832, and Mrs. Battersby's in 1840. I presume, too, that, as Sir B. Peacock was in India in 1857, he had formed his strong opinion previously to that year. Can we blind ourselves to the fact that, since these authorities declared themselves, there has been a great legislative ruling on the subject by Parliament? It was in 1857 that the first Divorce Act became law. It was not as if the question raised by Sir Barnes Peacock was not fairly raised in Parliament. In the House of Lords, Lord Lyndhurst urged the same arguments at great length, and in the House of Commons the question was raised by a long series of amendments. In the discussion on one of them, the Lord Advocate opposed the Bill of his own Government, and argued for that equality of the sexes which is recognised in his own country, Scotland. It cannot be denied that the view of the Chief Justice was fairly put before Parliament, and decisively overruled. Whatever may be thought in general of the expression 'wisdom of Parliament,' it seems to me more than a mere commonplace when an English social question is at stake, and I think it would be altogether out of place that this Council, which is a creation of Parliament, should set aside its authority in a matter which is practically the same in England as in India, and is governed by the same considerations in its effect upon English society and on Indian, which is a mere outwork of English society. There is something further to be urged. The measure for India, contemplated during the Parliamentary debates, was a measure corresponding with the English enactment. It was the English measure which was

recommended to us by the Secretary of State, which was framed by Sir H. Harington, and which was introduced by me into the Council. Throughout, it has been recommended, and probably supported, on the authority of English precedent. If the question had been reopened on first principles, how do we know that the Bill would have made any progress at all? One, at least, of the members of Council in charge of the Bill, Sir H. Harington, held very strict ideas on the subject of divorce, and perhaps would have argued for the absolute indissolubility of marriage if he had thought it open to him to do so. I am not sure that, but for the authority of Parliament, the measure would have reached the present stage, and I am not sure that, but for that authority, it would even now become law.

EMIGRATION

FEBRUARY 3, 1864.

IN 1864 the law relating to the emigration of Native labourers was contained in no less than seventeen Acts, besides Acts sanctioning French treaties on the subject, and the primary object of the Bill to which the following speech relates was to consolidate those seventeen Acts. It was the first of many consolidating measures passed during the tenure of office of Mr. Maine and his three successors, and rescued for a time the Indian Statute Book from the confusion and diffuseness into which it is now again unfortunately falling.[1] The Bill referred to by Mr. Maine became law as Act XIII. of 1864. It was superseded by Act VII. of 1871, and this by Act XXI. of 1883, amended by Act XVIII. of 1890, the present law on the subject.

Mr. Maine, in moving that the Bill to consolidate and amend the laws relating to the emigration of Native labourers should be referred to a select committee and reported on in three weeks, said that this was one of the Bills which was introduced under the 19th rule for the conduct of business, which rule empowered the Viceroy to give permission for a Bill to be brought in without the consent of the Council being first obtained. The rule was rather sharply criticised

[1] For example, the law relating to the small subject of Court-fees is now scattered through ten Acts and a lengthy notification.

out of doors at the time of its promulgation, but Lord Elgin defended it, and experience had shown the advantages arising from it. It enabled the framer of a Bill to bring his measure before the public, not only much earlier than would otherwise be possible, but at a time when public attention was not distracted by a multiplicity of legislative business; and for his own part he (Mr. Maine) gladly testified to its wisdom, for he could not overrate the advantages of the criticism on the Bills bearing his name, which had reached him not only from the Press, but also from numerous private persons. The subject of the Bill had been long under the consideration of the Government, and how urgently the consolidation of the emigration laws was needed would be seen by the members of Council if they would look at the 2nd section, which as the Bill stood was the repealing section. They would find that the law relating to Native labourers had at present to be collected from seventeen Acts, not to speak of Acts sanctioning French treaties—which Acts the Council was not at liberty to repeal—and rules of general law which had an incidental bearing on the subject.

So far as the Bill was a consolidating Bill, there were only two points which the Council should be specially invited to notice. One was that the previous legislation on the subject had been frequently modified as it proceeded, and that the present Bill embodied the latest and most improved stage of legislation. The second was that the Bill contained much that, though not found in any Act, was still old law. Through the exercise of the power given to the Governor General in Council to regulate the subsidiary parts of the machinery of emigration, a code of rules had been formed with regard to the protectors of emigrants, which was as much permanent law as if it had proceeded from direct legislation, and these rules would be found in the Bill. Again, regarding the Bill as an amending Bill, there was no doubt that the law of India in relation to the emigration of Native labourers did require change, at least if he (Mr. Maine) might judge from the enormous mass of papers that had reached him when he first addressed himself to the subject—papers containing suggestions and complaints from the Secretary of State, from local

governments, from foreign powers, and perhaps more than all from benevolent persons interested in the emigration of coolies. The Bill, founded on these communications, proposed a great variety of alterations in the existing law, but most of them were better fitted for discussion in committee than in the full Council. However, there was one class of amendments to which he would invite attention, because the reforms which they carried with them amounted to a total change of system. Every one present had probably a general idea of the present mode of recruiting labourers in India for foreign parts; they were collected over large areas of the country by recruiters, who were paid a percentage at the expense of the colony or foreign power seeking to enlarge its labour market. They were then brought in bodies or gangs to the port of embarkation, which was always a presidency town, and then came into play an elaborate system of checks and precautions, designed—and often successfully designed—to make provision for the emigrant's proper treatment during the voyage, to ascertain his state of health, and to establish his full comprehension of the contract into which he had entered. The weak point of the system was the stage of recruiting at which the labourer came into contact with it. The coolie when he reached the seaboard was already committed—he was embarked in the adventure—he had accomplished what was probably the most troublesome stage of the journey; he was not likely to listen to advice or dissuasion at that time. It was, moreover, said that the protector of emigrants sometimes failed to make himself understood by the intending emigrants, swept together as they were from the multitudinous races of India, not so much from ignorance of their language as from ignorance of their habits; for he (Mr. Maine) had heard—though it was a point on which he could have no personal knowledge—that to make oneself comprehended by the ruder natives of this country it was sometimes quite as necessary to understand their usage of address as their tongue. At all events, it was obvious that the greater part of the complaints and suggestions which he had described applied to one or other of the consequences of this system. It was not easy to meet all the difficulties, but the task had

been greatly facilitated by the preparation and enactment in the Council by his honourable friend the Lieutenant Governor of a most carefully matured and thoroughly considered measure relating to the recruitment of labourers for Assam and the tea districts. His (Mr. Maine's) Bill would follow closely the Bill of Bengal, with so much alteration as would effect its application to recruiting for foreign parts. The principle of it was simply the production by the recruiter of intending emigrants with as little delay as possible before the magistrate of the district, who would interrogate them as to their comprehension of the engagement, and give them every information and advice. He imagined it might fairly be said that the magistrate stood in a sort of patriarchal relation to the people. He would thoroughly understand their language and customs, and, more than most people, he would be able to detect false pretences on the part of the recruiter, and to discover whether any man intended to emigrate from a bad or an illegal motive—as, for instance, the desertion of his family. If it was clear that the labourer wished to emigrate, the magistrate would register him, and permit his removal to the seaboard; if, after so thorough an inquiry, the labourer still retained his intention of going over sea, he (Mr. Maine) conceived that no Government on earth had a right to prevent him. One advantage of the new plan was that it enabled him (Mr. Maine) greatly to simplify the machinery which was under the superintendence of the Protector of Emigrants at the presidency towns; for, the free will of the labourer having been placed beyond doubt up country, all that remained was to ascertain the state of his health and to make provision for his comfort during his passage to his destination. These last-mentioned points were regulated by many sections of the Bill.

There was only one other amendment to which he would call the attention of the Council. Section V., after reciting the places to which emigration was now lawful, provided that the Governor General in Executive Council might declare to what other places it should be legalised. The present rule was that emigration was unlawful by statute; but this prohibition was systematically relaxed when any colony or dependency of a foreign power established that it had made proper

arrangements for the reception of coolies. It was now proposed that when this Bill had once placed emigration on a satisfactory footing, the Governor General in Executive Council should decide to what new places it should be permitted. He (Mr. Maine) admitted that words ought to be inserted in committee throwing a positive legal obligation on the Executive Government to see that places seeking to obtain Indian labourers prepared for their safety and comfort by proper laws and arrangements, but with that exception he thought there were urgent reasons for leaving the section in its present form. First, there were technical reasons. According to the practice of the British Parliament, whenever a number of laws were consolidated into a single statute, they were always so consolidated as not to leave room for further legislation: any discretion as to carrying out or extending the Act was invariably confided to Her Majesty in Council, and never reserved to the legislature. The committees of the Privy Council, and in particular that great committee known as the Board of Trade, might be said to exist for the purpose of putting into execution the various important consolidation Acts which had been passed of late years, and of gradually bringing fresh cases within their sphere of operation. The reason he thought obvious: legislation was not a good in itself, it was only a good as leading up to good executive government, and it seemed to him a miscarriage of legislative art to frame a statute purporting and pretending to contain the whole law which should yet contain a provision for future legislation. After citing various Acts, Mr. Maine instanced 16 & 17 Vic. cap. 107 (the Customs' Consolidation Act), which, he said, by sections 324 and 325, empowered the Executive Government of England, on ascertaining certain facts as to the laws of foreign countries, to overturn, *pro tanto*, the very principle and basis of our commercial policy. This was an illustration something more than in point, because his (Mr. Maine's) provision only empowered the Executive Government of India to carry further, under restrictions, principles which the Indian legislature had sanctioned in twenty statutes. But he should be sorry the Council should think he had merely technical reasons for framing the section

in this form. There were reasons of substance, and most urgent reasons. The debate of last year on the St. Croix Bill[1] showed that the whole Council was alive to one danger which threatened India. To the old and false belief that India was a country overflowing with wealth had succeeded the new and equally false theory that it was a country teeming with men, and whenever benevolent statesmen in Europe were shocked by a revival of Negro slavery in any part of the world, it was obvious that their first thought was to replace the demand for Negroes by a draft on the population of this country. Now India lay outside the circle of European diplomacy, and let the Council suppose Her Majesty to be advised at some future time to agree to a treaty containing laxer and looser stipulations than those of the Bill. It would become the duty of the Executive Government to submit a Bill carrying out the treaty to the legislature—that was inevitable. What would that Council do? Insist on modifications of the treaty? That was improbable. On the whole and in the long run, it would turn out to be under the influence of the same feelings which actuated the English Parliament, and produced in it so strong a repugnance to interfering with the personal acts of the Sovereign, that the instances where even Parliament had refused to carry out the obligations of a treaty might almost be counted on one hand. He believed, therefore, that the Council would greatly strengthen the hands of the executive if it enabled it to say to foreign powers—'These are our conditions. If you wish to have emigrants, you must have them on our terms. It is not a matter for legislation at all; this is the fixed law of India, which is antecedent to, and presupposed in, every international engagement.'

He did not suppose that, though the sections which remained were doubtless susceptible of considerable improvement in committee, any member of the Council would entertain objections to them of principle. He thought that the Bill would be found to be a fair compromise between the opposing sets of considerations which must make themselves

[1] A Bill relating to emigration to the Danish colony of St. Croix, which Mr. Maine introduced on January 7, 1863.

felt by everybody who addressed himself to the subject of emigration. On the one hand, he could not conceive that anybody would deny the right—what some persons would call the natural right—of every native of India to go where he pleased for the sake of bettering his condition. Even if he thought that proposition disputable, he considered that the English in India were estopped from denying it. That we, who were thousands of miles from our home, who had come over half the world to embark our fortunes in India, should proceed to deny to the natives of India the right to go where they pleased to procure better remuneration for their labour, would be conduct which the world at large would regard, to put it gently, as the most extraordinary of English eccentricities. But, on the other hand, nobody would really wish that the natives of India should emigrate in large numbers, though he might not feel himself at liberty to refuse them the liberty of emigrating. We knew how ignorant and helpless they were—how readily they were deceived, and how easily oppressed. And we might not unnaturally suspect that those who were intended to be the successors of the Negroes might come in for more of the inheritance than was quite desirable. Moreover, we knew that in the existing state of India there was, or soon would be, room enough and work enough for every pair of arms which the country contained. If the Bill erred at all, it erred in giving effect to these last-mentioned views ; it erred on the side of stringency ; but on the whole, considering the character of the natives of those parts of India which were the theatre of recruiting operations, he did not think that it unduly shackled their liberty of action.

WHIPPING

FEBRUARY 17, 1864.

THE Penal Code as originally framed and published by the Indian Law Commissioners did not include flogging in the list of punishments. The Code remained in abeyance for upwards of twenty years, and when it became law in 1862 the omission was not supplied, owing to a desire that local officers and the public should have an opportunity of expressing their opinions on the subject. The result was an enormous increase in the gaol population and great addi-

tional cost to the State. The chief Local Governments reported strongly in favour of retaining flogging as a punishment, and a Bill to authorise whipping in certain cases was accordingly introduced by Mr. (afterwards Sir Cecil) Beadon. On the introduction of the Bill Sir Charles Trevelyan opposed it with the ordinary objections. Mr. Maine replied in the following speech, and the Bill became law as Act VI. of 1864. It may be added that the fullest safeguards against the abuse of the punishment are contained in the Code of Criminal Procedure, secs. 390-395, and that the following persons are expressly exempted, namely, (1) females, (2) males sentenced to death, transportation, penal servitude, or imprisonment for more than five years, and (3) males whom the Court considers to be more than forty-five years of age.

Mr. Maine agreed with his honourable friend that there were some grave objections to the punishment of flogging, although he was unfortunate in not being able to appreciate the precise objections which Sir Charles Trevelyan had pressed on the Council. One defect which he (Mr. Maine) perceived had not been mentioned by his honourable friend, viz. that flogging was incapable of remission. Once administered, it could not be taken back, whatever light further inquiry might cast on the convict's guilt. Mr. Maine also acknowledged that there was great force in Sir Charles Trevelyan's remarks on the practical inequality of the punishment. But after all drawbacks had been brought into the account, he could not agree in his honourable friend's conclusion. First among such of Sir Charles Trevelyan's objections as he did not concur in, he would take one which was put forward rather modestly, but of which everybody must see the point. His honourable friend had suggested that under the Bill a junior magistrate in the Mufassal might order a European to be flogged. That was a mistake. The Bill took away no privilege which Europeans at present possessed. European criminals would still be brought down to the presidency towns, and if the High Court or a Calcutta magistrate ordered a European who had been guilty of any of the offences mentioned in the Bill to be flogged, there was not the smallest reason for thinking that the European community would object.

As to Sir Charles Trevelyan's assertion that flogging brutalised the criminal, he (Mr. Maine) had heard it so many

times, not only from his honourable friend but from many other persons for whom he had the greatest respect, that he must suppose there was something in it; but for his part he must acknowledge that he did not even understand what it meant. What was intended when it was said that whipping brutalised? Was it, that it appealed to the offender's animal nature, as distinguished from his moral nature? that it caused, in short, physical pain? Why, every punishment deserving the name inflicted physical pain. If you shut a man up in gaol who was used to the open air; if you deprived him of stimulants when he was habituated to them; if you made him work when he was accustomed to be idle: in all these cases you inflicted physical pain, and pain sometimes even severer than the pain of a flogging. Some persons, including apparently his honourable friend, but certainly the authors of a petition which had been circulated, appeared to forget that when you sentenced a criminal to punishment you deliberately made up your mind to render him extremely uncomfortable; and for his part, Mr. Maine could not the least understand why one form or degree of physical pain should brutalise more than another.

His honourable friend further condemned flogging as a disgraceful punishment. He (Mr. Maine) was afraid he should shock his honourable friend, but he was bound to say that, considering the present state of the theory of punishment, it was to some extent a recommendation of any punishment that it was disgraceful. For (as he supposed) there occurred in India the same perplexity which occurred in England—and which had gone far to disturb what were once believed to be the first principles of a penal system—that criminals were found by experience not to commit crimes singly and by isolated acts; they had a tendency to form themselves into a class, with rules and maxims and a code of honour of their own. The very difficulty was that ordinary punishments were not felt by them to be disgraceful, and if, therefore, a punishment could be discovered which roused under all circumstances the sense of shame, that punishment would have a value of its own.

After all deductions had been made from the penal

efficacy of flogging, there still remained one immense advantage, that it was the most strongly deterrent of known punishments—so deterrent, indeed, that the legislator was under a constant temptation to employ it without regard to counterbalancing disadvantages. His honourable friend had strangely argued that the English examples of Whipping Acts were not in point, because no flogging had been administered under them. The truth was, that the terror of the law had done its work thoroughly; offenders were deterred and offences ceased.

He (Mr. Maine) would never advocate the infliction of whipping except sparingly and under careful restrictions; but what he did not comprehend was that this Council should oppose itself to the unanimous demand of the Local Governments. Such a refusal could only be based, as his honourable friend's argument showed, on certain abstract and speculative theories concerning punishment, and it was only fair to see what results those theories had given, so far as they had hitherto been permitted to govern practice. His honourable friend had pressed the Council with the authority of Lord William Bentinck, Lord Macaulay, and Mr. Anderson. Those were great names; but there was an authority greater than the authority of names, and that was the authority of facts. Now the fact was, that what he trusted he might call without offence the sentimental theory of punishment had all but collapsed; if it had not utterly broken down, it had at all events been rudely shaken. The theory began (not long before the time when the Law Commissioners reported) in a natural reaction against the savage punishments employed at the beginning of the century, and it was founded on the assumption (which was only very partially true) that all punishment should be directed towards the reformation of the offender. If ever a theory had been thoroughly tested, it was this theory during its trial in England. It was impossible to say what sums had not been lavished in England on the construction of gaols on ideal principles, and on an internal discipline adjusted to some theory. Perhaps his honourable friend scarcely reflected what he was promising when he promised that Indian gaols should be improved up to the English standard, and reformatories established

throughout the country. The outlay in England on gaols, gaol-discipline, and reformatories was little known, because the money came out of local, and did not appear in the public accounts; but he believed that the sums expended had been almost fabulous. What was the result? Twenty or thirty years of costly experiments had simply brought out the fact, that by looking too exclusively to the reformatory side of punishment you had not only not reformed your criminals, but had actually increased the criminal class. It was practically found that, by taking all the sting out of punishment, by leaving the criminal nothing but the recollection of a rather dull and monotonous episode in his life, you had increased the offender's temptations without improving his morality: you were actually adding to that community within the community which lived by crime. The truth which no candid man who had English experience to guide him would deny was that, by adjusting gaol discipline to one special principle, you had certainly not reformed your criminals, and probably had encouraged them. And if that were so in England, where you had men of the same race and nominally of the same faith as yourselves to operate upon, what certain results could you expect in India, where a wholly different set of usages and rules concerning the conduct of life prevailed from those which obtained at home? The great agent of reformatory discipline in English gaols was the chaplain. But what counterpart had the chaplain in an Indian gaol? He doubted whether his honourable friend had followed the most recent current of English opinion on these subjects. If any of the Council had read the reports of the committees appointed last year by the two Houses of Parliament, and the discussions among the county magistrates which had arrived by the last mail as to the proper mode of carrying out the recommendations of the committees, they would see that the formula which, after recent experience, commanded most respect in England was one which might well serve as the motto of that Bill—'Punish first; reform and instruct afterwards.' It would be found that the committee of the House of Lords on Prison Discipline had advised a liberal resort to the crank, the treadmill, and something called the shot-drill, and he (Mr. Maine) perceived that

in several counties a contrivance which was in special favour was a species of plank-bed, of which, if he understood it rightly, the peculiar ingenuity consisted in its rendering it extremely difficult for the convict to sleep. He confessed that the impression left on his mind by the Parliamentary reports and county discussions was that these noble lords and honourable gentlemen would have felt it a great relief if the authority of such great names as had been quoted to-day had not prevented them for having recourse to the simpler, and in his (Mr. Maine's) eyes much more innocent and less cruel, expedient of a sound flogging.

He submitted to the Council that the case was this: all theories on the subject of punishment had more or less broken down, not finally, he hoped, but for the present. We were again at sea as to first principles. Nothing then remained but to take experience for a guide, and here was every Local Government in India, every Government entrusted with the direct administration of the country, declaring that it could not keep the peace and tread down crime unless it were allowed to employ the punishment of whipping. The duty of making laws in one Council for all India was onerous enough; but if they, sitting in one corner of the country, were deliberately to say to these Governments that criminals were not to be flogged because flogging might brutalise a Bengali thief or a Panjábi dacoit, he must say that they would not only incur a very grave responsibility, but be going very close to the verge of absurdity. And if it were once granted that whipping, though it should be sparingly employed and carefully guarded, should nevertheless not be altogether excluded from the list of punishments, a more innocent Bill than this could scarcely be conceived. Whipping was only for a first offence to be given in substitution for other punishments: the judge at his discretion might order the convict to be whipped and released, thus saving him from the contamination of a gaol—contamination which existed not only here, but also in the most elaborately organised of English gaols. If the offender were convicted of a second offence, then, as on a fair assumption he might be supposed to belong to the criminal class, so that nothing was gained by saving him from the corruption of

imprisonment, he might for certain offences be flogged as well as imprisoned or otherwise punished. It appeared impossible, considering the weight legitimately due to the opinions of the Local Governments, that the Council should reject so mild a measure of concession to their demand.

OFFICIAL TRUSTEES

FEBRUARY 24, 1864.

THE Bill referred to in the following speech became law as Act XVII. of 1864, and has worked satisfactorily. The remuneration allowed to the official trustee is one-half per cent. on all capital monies received by him, one-half per cent. on all capital monies invested by him, three-quarters per cent. on all interest or dividends received by him, and two-and-a-half per cent. on all rents collected by him. Due provision is made for the security of the trust-funds and the audit of the official trustee's accounts.

Mr. Maine introduced the Bill to constitute an office of Official Trustee, and moved that it be referred to a select committee, with instructions to report in three weeks. He said the Bill was one of those which had been published under the 19th of the Council rules, by order of the late Lord Elgin. It was a measure introduced principally for the relief of a large class who suffered much from the existing state of the law, although they had not much opportunity of complaining of it—viz. women and minors. The inconveniences to which he alluded were felt much in England, but they made themselves still more felt in India, owing to the condition of Indian society. Trusts of private property might be said to have two objects: the first was to ensure the safety of the trust-funds; the second was to ensure the regular payment of the annual income derived from those funds. It was impossible to over-estimate the hardships which were suffered even in England in consequence of breaks occurring in the trusteeship—breaks arising from the death of trustees, their leaving England, their becoming lunatics, or generally from the trustees becoming incapable or unwilling to act in the trusts for the management of which they had been appointed. All the ingenuity of the framers of English trust-deeds had been used to make provision against these contin-

gencies, and several Acts of Parliament had also been passed to remove the difficulties of most usual occurrence. The expedient had sometimes suggested itself to people in England of appointing a trustee with perpetual succession—a public functionary with an office under him, the trusts descending from one officer to his successor in the office. Such a functionary, however, had never been appointed ; partly on account of the dislike of the English nation to the multiplication of public offices, and partly on account of the existence of the Court of Chancery, which was supposed to have the general care of the interests of persons interested in trust funds. Joint-stock companies, too, had been launched more than once, whose business it should be to undertake trusts, but such schemes had always broken down through the operation of the principle of English law, which would in no case allow a trustee to receive for his services any remuneration beyond his costs out of pocket.[1] The theory of the English law seemed to be that a man is remunerated for becoming a trustee, not by a payment in money, but by the claim he creates on his friends and fellow citizens to undertake trusts for his benefit in return. But here in India European society was so unstable and changing that there was but little probability of deriving reciprocal advantages from serving as trustee, while stability and regularity, the primary objects of a trust, were constantly sacrificed by the departures of trustees to Europe.' On the whole, he thought that a sufficient case was made out both for having a public office of trustee in India, and also for departing from the principle of non-remuneration. An official trustee had in fact been already appointed, and the principle of the Bill now introduced had been already recognised in Act XVII. of 1843, which enabled the Supreme Court to vest trust funds in one of its own officers, who was to be remunerated by a percentage. That Act, however, was very brief. It did not create an office of official trustee, and it applied only to the case of a trust once established, and likely to fail from the trustee having departed from the jurisdiction of the court. It moreover did not provide sufficiently for the security of the

[1] This is the general rule, applicable in the absence (1) of express directions by the settlor to the contrary, or (2) of a contract at the time of accepting the trust.

trust funds; and in Madras a sad case of defalcation of an official trustee had recently occurred. In framing the present Bill he (Mr. Maine) had followed somewhat the Administrator General's Act. Since the Bill was published, the opinions of several of the Local Governments and of the High Courts had been taken: those opinions were very generally favourable, but there was a difference of opinion as to the rate of remuneration proper for the official trustee. When preparing the Bill, he had consulted various mercantile men, solicitors, and other persons likely to be best informed on the subject; and from what he learnt from them he had thought that the remuneration provided for in the Bill would be sufficient. That was a fit subject for discussion in committee, and he doubted not that if those members of the Council who were best acquainted with commercial matters would allow themselves to be put upon the select committee, a satisfactory solution of the question would be arrived at.

REGISTRATION OF DOCUMENTS

MARCH 23, 1864.

THE Bill referred to in the following speech became law as Act XVI. of 1864. It was an ill-drawn measure not framed in the Legislative Department, and it had to be repealed and re-enacted by Act XX. of 1866. The present law on the subject is Act III. of 1877, and under the Transfer of Property Act, 1882, secs. 3, 54, 59, 107, 123, the Registration Act applies, throughout the greater part of British India, to every important transaction relating to immovable property. The Act III. of 1877 and its predecessors provide for the registration of *documents* not of *title*. Of some documents the registration is compulsory; of others voluntary—a distinction which has caused much difficulty; and perhaps the greatest benefit of the Indian system is that it supplies proof that a given document was in existence at a certain time and was not fabricated afterwards. These Acts were never intended to raise money for the general purposes of the State, but the financial needs of the Indian Government render it impossible at present to apply the registration fees,[1] after defraying the necessary expenses, to increasing the number of registration offices, so as ultimately to have one within easy reach of every inhabitant of British India. The Act might then

[1] During the year 1885-86, the Registration Department in India yielded a net surplus to the State of Rs. 1,215,930. The Editor has not the figures for subsequent years. They are probably much larger.

be extended to many classes of instruments now excluded from the operation of its compulsory clauses, and the result would be not merely a diminution of fraud, but a sensible increase to the selling value of land throughout the country.[1]

When Mr. Ellis, the member in charge of the Bill, moved that the report of the Select Committee be taken into consideration,

Mr. Maine said that the Bill had been so long before this Council and its predecessor, and before their committees, and so many persons had successively had charge of it, that there was some danger, in giving any one person credit for it, of doing injustice to former members of the legislature. All, however, who had been associated with his honourable friend Mr. Ellis would testify to the zeal, patience, and sagacity which he had brought to bear upon the measure, and the Council and the public had much reason to be grateful to him for his labours. The Bill which had now come to maturity was one of which it was almost impossible to overestimate the importance. Everybody who had turned his attention to the improvement of civil justice in India must have found his calculations baffled by one peculiarity of the country, the doubt which hung over the authenticity of all documentary evidence. So far as regarded one great class of documents, documents relating to real property, these doubts would shortly be dispelled through the operation of this measure. The modified compulsion to register other classes of documents which the Bill originally imposed, the select committee had not thought fit to insist upon, and on the whole he agreed with the committee. In a country like this, where the vast mass of the population lived entirely by usage—and where the difficulty attending legislation was not so much that of passing laws as of promulgating them, of bringing them to the knowledge of the people—cruel injustice might be done by changing anew the law of limitation, and hence he (Mr. Maine) concurred in the expediency of a double law. What importance belonged to that part of the Bill which provided for a voluntary registration would now depend upon the courts, which, he ventured to think, would always require an explanation where a litigant might have registered a deed and had

[1] *The Anglo-Indian Codes*, ii. p. 1006.

omitted to do so. He (Mr. Maine), however, agreed with his honourable friend that the measure must sooner or later go much further, and that a time would come when, on the production of any document in any Indian court, the court would at once have all reasonable certainty of its genuineness and authenticity. Besides these objects, another object of registration was to give purchasers of real property the means of ascertaining the existence of documents affecting the state of the title. How far the measure was efficient in that respect would depend on the way in which its machinery was worked; and it would be the duty of the local governments and of the supreme Government to see that the registers were kept in such order as to afford the utmost facility in the search for incumbrances. The Bill, as a whole, was one which the Council might fairly be congratulated on passing.

RE-MARRIAGE OF NATIVE CONVERTS

NOVEMBER 4, 1864.

THE object of the Bill referred to in the following speech, a Bill which became law as Act XXI. of 1866 and has completely removed the hardships against which it was directed, was to legalise under certain circumstances the re-marriage of Native converts to Christianity, who were, in consequence of their conversion, deserted or repudiated by their wives or husbands. The history of the measure is best given in Mr. Maine's own words, as contained in the following minute dated February 20, 1866:

It is necessitated by some provisions of the Indian Marriage Acts XXV. of 1864, repealed and re-enacted by V. of 1865. Clause 3, section 48 of the latter Act, makes it a condition of the marriage of Native Christians under Part IV. that 'neither of the persons intending to marry shall have a wife or husband still living,' and section 19 makes it probably impossible (through the operation of the words 'lawful hindrance') for a Native Christian having a living wife or husband to be married under Part II.

What was the state of the law on this subject before 1864 is a matter which has never been clearly ascertained; and,

indeed, I have been much struck, during the discussion on the Bill, with the universal vagueness of the opinions which have prevailed on the questions involved under all their aspects. Sir B. Peacock held that a convert having a wife alive could not be married by a registrar under Statute 14 & 15 Vict. c. 40, and Act V. of 1852, and on the whole, considering the terms of the statute, I think he was right; but those laws are only permissive. It is also possible that in consequence of the wide language of the statute of Geo. IV.[1] (which, however, was never intended to apply to such a case, and has been impliedly repealed by the Penal Code) a re-married convert might, in the presidency towns and by the Supreme Court, have been punished for bigamy. My own opinion, however, is that if the convert kept clear of the difficulties created by the English statutes, he might not only have lawfully married a new wife, but as many wives as he pleased, provided his original religion permitted polygamy. It seems to me inconceivable that he could so have changed his legal position as to have rendered marriages subsequent to conversion invalid. If so, the Penal Code would not apply to the case.

I inquired into the subject when I was on the western side of India, where the line between heathenism and Christianity is sometimes very faint, and I found that there were tribes which, at periods of years, oscillated between some form of Hindúism and some of the Oriental forms of Christianity, such as Nestorianism. This change made no difference in their habits of polygamy; but nobody had ever heard of the criminal law having been brought to bear on them, or of the civil rights of their children having been affected.

Practically, over the greatest part of India the missionaries re-married or refused to re-marry their converts according to their conscience and theological views; but they constantly protested against the uncertainty of the law.

But in 1864 it was finally determined to put an end to the numerous and formidable doubts which had arisen concerning the whole Christian matrimonial law of India, in its application, not only to Natives, but to Europeans. The

[1] 9 Geo. IV. c. 74, expressly repealed (except secs. 1, 7, 8, 9, 25, 26, 56) by Act X. of 1875.

framers of Act XXV. of 1864 decided to bring Native converts under the general rules governing Christian marriages, but it was with the clearest knowledge that the special case of a Native convert deserted on religious grounds by wife or husband would have to be dealt with separately.

Mr. Maine, in moving for leave to introduce the Bill, said that there was probably no subject which had been longer before the Indian Legislature than that to which his motion related.

Ever since the supreme Government of India possessed true legislative power, *i.e.* since the Act of William the Fourth passed in 1833,[1] there had been always before it some proposal, and generally a multitude of proposals, for giving relief to Native converts to Christianity whose wives persistently refused, on religious grounds, to cohabit with them. Among the papers in the Legislative Department, there were two separate Bills framed to permit the re-marriage of such converts, one of them bearing the name of Sir Charles Jackson, the other that of Sir Barnes Peacock. Mr. Maine's immediate predecessor, Mr. Ritchie, had just before his death obtained leave to introduce a Bill on the subject, so that the present motion constituted the fourth instance in which positive action had been taken. He (Mr. Maine) ventured to say of this long delay, what could not often be said of delay in matters of government, that it was far from discreditable to those who had caused or acquiesced in it. There was no trace in all the papers which he had read of any carelessness or want of interest. All the officials who had taken part in the discussion had expressed the strongest sense of the importance of the subject, and had manifested the most sincere anxiety to discover some admissible measure of relief; and, indeed, Mr. Maine would say that the documents he had perused, extending over thirty years, went far to exonerate the Government of India from that charge once so often brought against it, that, of all the races and classes committed to its care, none had so little of its tenderness as the converts to its own faith. Still less did the papers disclose any sign of undue timidity on political grounds. Although Lord Canning's Government undoubtedly

[1] 3 & 4 Wm. IV. c. 85.

expressed an opinion, that any law on the subject ought to be a Government measure, neither it nor any other Government or person appeared to have ever thought that, on such a point, the view of the Hindú or Muhammadan part of the population ought to prevail; indeed, the obvious probability was that the matter was entirely indifferent to natives of India not converted to Christianity.

The reasons of the hesitation which had so often shown itself were of a very different description. First, there were those objections which grew out of the moral or religious creed of the persons composing the executive and legislature. Some had thought a law like this doubtful on moral, and others on theological, grounds; and a great number had manifestly been unwilling that, in its first legislation expressly relating to Native Christians, the Christian and dominant race, of which the legislature was then exclusively composed, should place on record anything like a lax or equivocal construction of conjugal obligations. But doubtless the chief cause of the delay was the perplexity caused by the extraordinarily various and conflicting proposals of those more immediately interested in removing the grievances of the converts. It was natural that missionaries and missionary bodies should look upon the subject under a special aspect. Whenever one of those excellent persons persuaded himself that the re-marriage of a convert, whose wife declined to follow him, was not forbidden, he naturally formed some theory to justify his persuasion, and then he invariably pressed the Government to adopt it. Mr. Maine would give two instances of such theories as samples, two of a remarkably large number which had been pressed on his attention. Some of the most active clergymen and missionaries in India were of opinion that unconsummated marriages between children of tender years are void by the law of God or of nature, and hence they were willing that the law should permit the re-marriage of a person married in infancy, but repudiated by his wife before cohabitation. But they would not go further. There were others again who, holding the more tenable opinion that the law which governed the solemnisation of the marriage ought to govern the dissolution,

looked rather to the heathen than to the Christian rule of divorce, and adopted a theory that, under Hindú and Muhammadan law, a convert to Christianity was *ipso facto* divorced—in the case of Muhammadans by the express ruling of their religious authorities, in the case of Hindús by a consequence derived from the principle of what may be called religious death. On this theory there was, of course, no difficulty in permitting a convert, at least a male convert, to contract a second marriage. There appeared to be in existence at least a score of such speculative views of the question, some altogether distinct from the doctrines which he (Mr. Maine) had described, some involving more or less modification of them. It was inevitable that the Government, entertaining the greatest respect for the missionary view of the subject, should hesitate to make a selection between these conflicting theories—to take its stand on one of them, and to introduce a Bill confined to the limits of that one theory. Hence, in their embarrassment, successive Governments had been tempted to leave the question alone, perhaps in the same hope which seemed to possess not a few of the missionaries themselves, the hope that the knotty point, if you did not touch it, would solve itself. Now, unquestionably, there was in politics such a thing as judicious inaction; some questions when left to themselves settled themselves, but not, as Mr. Maine thought, when the *status quo* contradicted, so to speak, a law of nature. The true mode in which this particular question had been solving itself had been brought out by that valuable law, the new Marriage Act—valuable, though it might require some modification—framed by Mr. Anderson and passed by the Council in the spring.[1] That law, the Council were aware, imposed penalties on persons celebrating marriages not in accordance with its provisions, but a remarriage under the circumstances to which Mr. Maine's Bill would relate was not allowed by Mr. Anderson's Act, and hence to celebrate it was a punishable offence. The remonstrances which this state of the law had elicited showed that a considerable number of the missionaries did habitually

[1] Act XXV. of 1864, repealed by Act V. of 1865. The present law on the subject is Act XV. of 1872.

celebrate these marriages, and probably, rather than tolerate open concubinage among their converts, they would feel it their duty to defy the law and continue to solemnise such marriages at the risk of punishment. This was in itself an urgent reason for no longer postponing legislation, unless the Council should be positively of opinion that the re-marriage of converts under these circumstances ought not to be permitted for some reason of religion, morals, or policy. Mr. Maine, for his part, had convinced himself that a measure of relief was not only admissible but obligatory, but, before he stated the grounds on which he rested his view, he would say at once that he entirely objected to any enactment adjusted to the limits of such theories as he had been attributing to the missionaries. The Council would remember that any such enactment would in fact amount to a legislative affirmation of the speculative basis of the theory selected for application. Now he (Mr. Maine) held that it was not the business of that Council to affirm propositions of law, and still less of theology. Their duty was not to say what the law was, but what it ought to be; and, on the other hand, there was an obvious incongruity (he might almost say indecency) in that Council, composed as it was,[1] saying what was or was not sound Christian theology. The only aspect under which they could consider questions was their moral or political aspect; and, no point of policy here arising, the argument which he would employ to justify his Bill would wholly derive its force from moral considerations. It was true that, although his view was quite independent of purely theological reasoning, it would be difficult or impossible for him to place it fully before the Council without seeming to travel into the province of theologians; but the fact was, it was necessary for him to go into the history of the controversy which had always existed on the subject in the Christian world, and in order to do that he must state shortly the theological views which from time to time had been adopted by the disputants.

He would first observe that his endeavours to acquaint himself with the views actually entertained by the various sections of the Christian community in India on this subject

[1] Three of the additional members were then Hindú nobles, and one was a Muhammadan.

had been greatly facilitated by an interesting series of papers, the records of the Panjáb Missionary Conference. All the opinions current among the missionaries in any part of India were, he believed, more or less indicated in that volume. At the same time, the discussion at the Panjáb conference had, as a complete account of the matter, the serious defect of being wholly confined to the modern and recent aspect of the controversy. All the speakers appeared to have been ignorant, or to have designedly omitted all mention, of the fact that the question of the re-marriage of Christian converts had an ancient as well as a modern history. The truth was that the controversy was one of the oldest of those which had ever agitated the Christian Church, and it had only lost its interest through the conversion of the entire Western world to Christianity, and the consequent cessation of marriages between Christians and heathens. He (Mr. Maine) would presently show how important a bearing this fact had on the argument for the Bill. He would now observe that the only difference between the controversy as now debated between Indian missionaries and the controversy in its ancient stage consisted in the different Scriptural grounds on which the disputants based their reasoning. In the early Christian Church, the dispute turned wholly upon the proper application of an analogy. It was conceded on all sides that divorce was lawful on the ground of adultery; it was then contended, in conformity with a metaphor common in early Christian times, that heathenism was spiritual adultery; and hence it was concluded, by those who took the affirmative side, that obstinate persistence in heathenism on the part of husband or wife was an adequate justification of divorce. Mr. Maine did not assert that this argument was always thought satisfactory, but he did assert, as a matter of history, that the preponderant weight of authority was always in its favour. How strong was the persuasion which it carried with it, might be seen from a passage which he had with him, from a writer so old that portions of his treatise were often found inserted at the end of the oldest manuscripts of the New Testament—the author of the book called the Shepherd of Hermas. (The substance of the passage was, that adul-

tery was not only corporeal but spiritual, and that heathenism, being spiritual adultery, justified divorce.[1]) Mr. Maine cited that passage, not to insist on its cogency, but to show the antiquity of the theological opinion with which the Bill was in harmony. And the reason for bringing into prominence the opinions of the early Christian Church was his strong impression that many of the speakers at the Panjáb missionary conference were actuated by a half-conscious fear that it was only the temporary convenience of the moment which was producing a belief in the lawfulness of re-marriage by converts. They appeared to distrust a conclusion which was so obviously expedient in the interest of Christian missions. But when it was once seen that the opinion with which the Bill harmonised was certainly not the fruit of the peculiar position of Christians in India, when it was seen that this opinion had been strongly held ever since the first appearance of Christianity in the world and had only been lost sight of through the Christianisation of the West, they would probably display less timidity in approaching the question, and yield up their minds more unreservedly to the more modern, and doubtless in some eyes the more satisfactory, arguments in favour of the lawfulness of re-marriage. Sir Charles Jackson had correctly stated that those modern arguments turned entirely on the interpretation of a single text—'But, if the unbelieving depart, let him depart; a brother or sister is not under bondage in such cases; but God hath called us to peace' (1 Corinth. vii. 15). Now it would not be expected that he (Mr. Maine) should offer to the Council any theological commentary or criticism on that passage; but there were two remarks which he would wish to make, not as a theologian, but as having some acquaintance with legal antiquities. It was said by some opponents of the measure, that the text justified at most a divorce *a mensâ et thoro*—a judicial separation. That view involved an anachronism. The only divorce known in the world when the words were written was an absolute divorce—*a vinculo matrimonii*. Mr.

[1] Possibly the passage referred to is *οὐ μόνον, φησίν, μοιχεία ἐστίν, ἐάν τις τὴν σάρκα ἑαυτοῦ μιάνῃ, ἀλλὰ καὶ ὃς ἂν τὰ ὁμοιώματα ποιῇ τοῖς ἔθνεσιν, μοιχᾶται,* or according to the old Latin version, *Is qui simulacrum facit moechatur*, Hermae Pastor, lib. II. mand. iv.

Maine, speaking from recollection, would say that divorces *a mensâ* were of later date by some hundred years. Other persons who doubted the lawfulness of the measure expressed an opinion that the words of the passage, whatever were their meaning, were not sufficiently marked, distinct, and strong to warrant the conclusion drawn from them. Mr. Maine, still speaking as a lawyer, asserted that stronger language could not have been used. The words employed were the technical words of Roman law implying absolute divorce. He might appeal to the school-day recollections of the European members of Council, who would remember that the ordinary formula of divorce was, *abi, discede*, or, as the phrase would run when turned into the third person, *let him depart.* The writer of the passage was, as everybody knew, a Roman citizen ; he was plainly well acquainted with the Roman law of persons, under which he lived, and here he had simply translated into Greek the usual legal phrase implying that absolute divorce which carried with it the power of re-marriage.

The first conclusion therefore which he (Mr. Maine) drew was that the measure which he asked permission to introduce would neither offend the opinions of the whole Christian world, nor the better and more instructed opinion of any Christian sect or community. The fact was that, taking Christendom as a whole, there was even a greater weight of authority in favour of the re-marriage of converts under the circumstances contemplated by the Bill than in favour of the principle of divorce on the ground of adultery. For, as was well known, the Roman Catholic Church did not permit divorce on the ground of adultery ; it did, however, permit the re-marriage of converts on the authority of the text he had cited, as he (Mr. Maine) had gathered from some documents which had been forwarded to the Government from the Roman Catholic congregations in the south of India. He did not pretend to speak with any certainty of the Roman Catholic doctrine on the subject, but he believed it to be founded on the assumption that it was at the option of the Church to recognise heathen marriages, and that persistence in heathenism justified non-recognition.

The preliminary difficulty which would have arisen from

the repugnance of the Christian community being thus removed, the next thing was to inquire what positive reason there was for interference on the part of the Council. On this point he (Mr. Maine) would reason as follows. It was absolutely necessary to adopt, in India, the theory which obtained in most European countries of a distinction between the secular or civil and the religious or ecclesiastical power. It needed only to examine the composition of the Council to see that no other doctrine than this could possibly be propounded in it. The Council, then, representing the secular power, had the right to guide itself by reasons of morality as distinguished from religion, for nobody had ever doubted that the purely moral view of questions was, to employ the figure which had been so often used to illustrate this distinction between the powers, one of the things which are Cæsar's. Now he (Mr. Maine) asserted that the law of marriage in India, in its application to Native Christians, had a tendency to produce—he very much feared it did actually produce, but at all events it had a distinct tendency to produce—immorality. The state of things was this. The great majority of Hindús were married before they reached the age of reason. Converts to Christianity were, however, brought over by the operation of reason, and the condition of Native society was such, that reason had necessarily much greater influence over one sex than the other. Hence, the tendency of the law in its present state was to produce a celibate class. Now Mr. Maine would lay down, even of European countries, that a law which by its direct incidence assisted in creating a class condemned to celibacy was immoral and bad. And if that was true of Europe, how did matters stand in India? The subject was one which could only be touched upon lightly, but it was certain that all the essential differences between Oriental and Western society tended to augment the immorality of the law in India. They must not forget that touch of asceticism which European societies, even Protestant societies, had derived from the middle and early ages, one result of which was that, to a European, a life of prolonged celibacy seemed intelligible and tolerable. But was it necessary to prove elaborately that, to an Oriental trained in the

zenáná, the very conception of such a life was probably unintelligible, monstrous, and against nature? Mr. Maine well knew that some of the missionaries asserted that their converts underwent a moral purification which rendered the trial endurable to them. That might be true in some, perhaps in many, cases; but he contended that the assumption of its truth was one which the secular power had no right to make. It could only look at the law in its normal and ordinary application to Oriental nature.

The measure, therefore, would be an interposition of the State, or civil power, from its own point of view. It would be a law of liberty and constrain no man's conscience. Nobody would be compelled to re-marry converts if he had scruples on the point; but, on the other hand, the State would decline to impose penalties on a clergyman re-marrying them. People might take what religious view they pleased of the position of the convert re-married; but the law would not refuse him or her civil conjugal rights, and the children would have the civil rights attending legitimacy. If the doctrine or discipline of any Christian community forbad re-marriage while the first wife was alive, its ministers need not celebrate re-marriages: their power to keep the convert from re-marriage without risk to morality would be a strong proof of their influence over him, it being understood that the responsibility of refusing to re-marry rested on them, and not on the State. On the other hand, the principle of the Bill would give room for all partial theories of the lawfulness of divorce. Any sect, persuaded that divorce was lawful up to a certain point or under special circumstances, might within the limits of the law work out its own theory.

The Bill, which was not yet completed, would be founded partly on Sir Charles Jackson's draft, and partly on Sir Barnes Peacock's. It would not permit re-marriage till a considerable interval had elapsed, which would be reasonable evidence of final desertion or repudiation. It would provide for the examination of the parties by a Judge, and he (Mr. Maine) thought it would allay some scruples if the proceeding in the first instance took the form of a suit for the resumption of conjugal society. It would also be a desirable

addition to the older drafts, if provision were made for the convert having the opportunity of trying his own persuasions on his wife, in an interview not overlooked or controlled by her family. There would be many difficulties of detail, but he hoped they could be overcome. It was, he might say, a peculiarity of the subject that points which seemed at first sight immaterial proved to be of great importance, while difficulties apparently of the greatest magnitude turned out to be no difficulties at all. For example, the language of the Bill must be carefully adjusted to the theory of its secular origin; and it was most essential to avoid the mention of divorce, for otherwise the large Roman Catholic community in Southern India, numbering now nearly a million souls, would lose the benefit of the law. On the other hand, the contingency of a convert having several heathen wives, which at first sight appeared most difficult to deal with, was in fact scarcely worth taking into account, as the classes from which the converts came were practically monogamist.

Considering that the law of England, as applied in England, recognised no religious scruple however strong, or personal distaste however unconquerable, as a reason for refusing to resume conjugal society—considering, on the other hand, that everybody in India shrank from absolutely compelling the heathen wife to rejoin her husband—Mr. Maine thought that this Bill followed as a consequence. Otherwise they were open to the reproach that, while they were creating a special class by their direct action on the country—partly by the energetic efforts of missionary societies, partly (he would hope) by the exhibition of the most eminent ingredient in their own civilisation—they laid on it a burden which they themselves, in their own country, did not so much as touch with the little finger.

The motion was put and agreed to.

[On January 6, 1865, after a debate in which the Governor General (Sir John Lawrence), Mr. (now Sir Wm.) Muir, Mr. Harington, and Mr. Cust took part, Mr. Maine replied as follows:]

Sir, the wide difference of opinion as to principle which has shown itself between your Excellency and my honourable

friend Mr. Muir on the one hand, and my honourable friends Mr. Harington and Mr. Cust on the other, goes, I think, some way to justify my view that the only mode of solving this difficult question is by requiring those who, by their active exertions, have added to Indian society this class with whose interests we have such difficulty in dealing to take upon themselves, and to relieve the State from, the responsibility of saying when their converts ought or ought not to be re-married. Deeply, however, as Mr. Harington and Mr. Muir differ, they seem to agree in considering that unconsummated marriages between children may legitimately be neglected, and that after a mere betrothal a Christian convert may be allowed, without more, to re-marry. Of course, Sir, from the point of view which I feel myself compelled to occupy for the purposes of this discussion, the point of view of secular morality, there is much to be said against infant marriages. I have never conversed with an educated Native gentleman who did not allow that these marriages are deeply injurious to the morals of Native society. I fear, however, that if we allowed a young man to acquit himself of the obligations which Hindú law and his family have imposed upon him by the mere fact of having changed his religion, we might expose this measure to imputations which cannot, I think, be justly brought against it as it stands: we might open the door to grave abuses, and certainly should give room for great scandal. On the whole, I think that the safer course is that the convert should allow his wife an opportunity of joining him when the period of infancy has gone by. But it is a point for consideration in committee whether, in the case of a marriage not followed by cohabitation, some of the interviews and interrogations provided by the Bill might not be dispensed with. My honourable friend Mr. Harington inquires whether the missionaries will not be satisfied if, in addition to a measure permitting their converts to neglect mere betrothals, a law allowing divorce on the ground of adultery be enacted. There is reason to believe that Her Majesty's Government is likely to introduce into the British Parliament a measure giving Indian divorces between Christians the same effect as if they had been decreed in the English Divorce Court. And if such a measure be passed, it

will certainly be the duty of your Excellency's Government to introduce into this Council a Bill providing for the dissolution of marriage on the ground of adultery, and applying to all Christians in India, Native as well as European. But, Sir, when it is contended (I do not know whether my honourable friend so contends, but it is sometimes contended) that such a law can be regarded as a substitute for this measure, the argument is one which I regard with the extremest repugnance and dislike. For, stripped of all disguise, it seems to me to come simply to saying this: 'If you will only hold your hand, if you will only do nothing, the heathen wife is sure to be guilty of adultery, and then you may divorce her without shock or injury to the conscience of the Christian world.' Now, Sir, it is one of the recommendations of this Bill in my eyes that it protects the morality of the heathen wife no less than the morality of the Christian husband, and, by permitting her to re-marry, displaces, so far as legislation can displace, that ground of divorce which some persons seem to think more satisfactory than the practical defeat of the objects of marriage.

As regards the observation of my honourable friend that the Bill inflicts a punishment on the wife, who, according to her own views, has been guilty of no wrong, the answer is that in all civilised societies under express law, and in all uncivilised societies under law expressed or unexpressed, there exists a proceeding analogous to the suit for restitution of conjugal society. It is true that the refinement of sentiment and manners in Europe rarely allows this proceeding to be resorted to; but legislators have not thought fit to expunge it from European codes, and, indeed, in more than one European code it has latterly been made more stringent. It will generally, indeed, be found that in proportion to the repugnance of the framers of a body of law to divorce is the stress they lay on the rule that the wife must always be with her husband—a rule which they occasionally enforce by criminal penalties. Nor is any loathing, however deep, a reason for not executing the obligation. Now, will you compel the heathen wife to rejoin her Christian husband against her will? You cannot, and I may almost say, you dare not. But if this be so, the word

'punishment' is entirely inapplicable to a measure like this, for whatever be the penalty you inflict on the wife, it is a penalty which, according to her views, is infinitely slighter than that which, according to the principles both of civilised and barbarous law, she might be compelled to submit to. Strictly speaking, she should join the husband whom she loathes with a loathing unknown in Europe. But instead of forcing her to do so, you permit her to re-marry, and protect her in her personal and proprietary rights.

Of course in my honourable friend's appeal to the bishops, the clergy, and the missionaries carefully to consider this measure, I most heartily concur; and I deliberately abstain from replying to much that has been said by Mr. Cust and Mr. Harington, because I think that the answer will come with much more grace and with much more effect from those to whom this appeal is addressed. But, Sir, I have read so much of the sort of communications which may be expected to be elicited by this appeal that I may be pardoned for offering, with the greatest respect, a few cautions. Sir, if the missionaries or the clergy can establish that the morality of their converts will be injured by the Bill, that will be a fact of the highest importance. If, again, they can show that the conscience of the Christian world will be shocked by this measure (and of course we can only know the feeling of the Christian world by ascertaining the feeling of its various sections), that, too, will be a fact of which this Council will be bound to take notice. But if they are tempted to enter into purely theological arguments as to how and when and why these marriages are lawful or unlawful, I would ask them merely to read the list of the members of this Council, and to say with what decency it can be required to decide whether such considerations are right or wrong, sound or unsound. A second caution I have to give is this: the gentlemen who have signed the single petition against the Bill which is in the hands of members affirm, with some boldness, that the Native wife comes over to her husband in the great majority of cases. My own information contradicts this; and I have generally found that those missionaries who have doubts as to the Bill confine themselves to alleging that, if some long period of

time be taken—such as eight, or ten, or twelve years—the probability is that the wife will come over. Indeed, as it is only recently that great success has been obtained by the missionaries, there has not been time for the attainment of more than a probability. But, Sir, the assignment of these long periods of time constitutes no answer, I must say, to my argument—that is, to the secular and moral argument. For the obvious rejoinder is, what sort of life has the convert been living in the interval?

I will venture yet another remark for the consideration of gentlemen who may respond to my honourable friend's appeal. It has often struck me that, in abstract or moral questions which appear hopelessly insoluble, a great part of the difficulty usually arises from persons confidently employing words without having quite ascertained their meaning, and their true relation and correspondence with things. I would ask the opponents of this Bill whether they are quite sure of the sense in which, for the purposes of this controversy, they use the terms 'marriage,' 'divorce,' and the like. The theory which they hold, I believe, is that marriage is a civil institution, consecrated by Christianity; consequently, they take the definition of what constitutes marriage from the civil and secular law, and, in this country, from the heathen law; but the incidents and consequences of marriage they interpret by Christian law. It is obvious, however, that the theory breaks down in its application to polygamous societies, for each one of many wives is as much a wife as the others, so that those who hold this view are compelled to take a mere fragment of the secular definition and prop up the theory with it. And it illustrates the difficulty of the question that, as I can assure the Council, we shall probably, in committee, have to take account, not only of polygamy in the ordinary sense, but of polyandry; to provide for the case not only of a man having several wives, but of a wife having several husbands. It is only because I await fuller information as to the degree in which the civil courts in the south of India recognise this practice that I have omitted all reference to it in the Bill. In short, Sir, if we take India as a whole, I believe it will be found that the forms of marriage are so monstrous that it is

impossible to make them fit in with civilised, and still less with Christian, theory. It would seem, therefore, that we are thrown back on the very foundations of the institution of marriage. Accordingly, I would submit to those who doubt the principle of this measure whether a reasonable theory (I will not say *the* reasonable theory, but *a* reasonable theory) be not that of the Roman Catholic Church, which, as I understand it, is that, while the most serious efforts should be made to bring over the heathen wife to her husband, the heathen marriage, nevertheless, has in itself no such sanctity as will compel the missionaries, out of respect to it, to acquiesce in the defeat of the practical objects of marriage. However that may be, as to what should be the secular view I have no manner of doubt. I consider the creation of a celibate class fatal to morality in India: and when the gentlemen who have signed this petition express a fear that the measure may lead the heathen to believe that Christians think lightly of the institution of marriage, I would beg them to ask any Native gentleman whom they can depend upon to give a frank opinion what he thinks of a proposal that celibacy be practised for a series of years by a Native Christian, or any other Native. I must repeat what I said in the first debate on the subject, that if no such measure as this be passed, there is too much reason to fear that the missionaries, with the very best intentions, at the cost of enormous self-sacrifice and immense self-denial, will nevertheless in effect be propagating immorality in the name of Christianity.

On March 31, 1866, when moving that the report of the select committee on the Bill be taken into consideration, Mr. Maine spoke as follows:

In submitting this important Bill to the Council, I shall perhaps do well to depart a little from the course usually pursued when the motion is that the report of the select committee be taken into consideration. That course I understand to be, to assume that the principle of the Bill was affirmed when it was referred to the committee, and to confine oneself to explaining and justifying the committee's recommendations. But I can add nothing to the reasons assigned by the select committee for its amendments, and indeed I do not

suppose that anybody would object to amendments who does not object also to the principle of the Bill. In truth, I cannot conceal from myself that it is the principle and policy of the measure which have been in question throughout, and that nobody quarrels with the details who does not question the lawfulness or the expediency, or both the lawfulness and the expediency, of any legislation on this subject.

I do not now propose to justify directly the principle of this measure. I have said enough about that already in former stages of the discussion, and indeed I have little more to say. But I propose to lay before the Council the history of the measure; to show what were the evils of which the measure is remedial; to point out what was the political and legal situation resulting from those evils, and to demonstrate that out of that situation there was but one way of escape. I hope to prove that it was simply impossible not to legislate on the re-marriage of Native converts repudiated by their heathen wives, and that, the necessity having arisen, only one mode of legislation was practicable and permissible. Of course I do not mean to say that I am not warmly and heartily in favour of this Bill. But it is due to myself, and, what is much more important, to his Excellency the Viceroy—and I say it all the more heartily in his absence—to establish that, whoever was at the head of the Government of India, and whoever was in charge of its legislative business, some measure of this kind must have been submitted to the Council, and that this measure could not widely have differed from the Bill now under consideration, or at least (and this I am entitled to say) could not have differed from it by any difference which has been pointed out to us by the numerous persons who have engaged in the discussion upon it.

It is first of all necessary for me to explain—so far as explanation is possible—what was the state of the law among Christians—the law governing the celebration and formalities of marriage—before the legislation of 1864; before the two Marriage Acts of 1864 and 1865, one repealing and re-enacting the other, which I may call for convenience Mr. Anderson's Acts.

If there are any members of Council present who recol-

lect the discussions on Mr. Anderson's first Bill, they will agree with me that the uncertainty and confusion which the matrimonial law exhibited can only be described by one epithet—it was chaotic. The doubts affecting it covered the whole ground between a doubt whether the marriage law in India was not stricter than that of England, and a doubt whether it was not laxer than that of Scotland. This condition of things had long existed, and, having it in view, Parliament had provided a partial remedy by passing, in 1851, the Statute 14 & 15 Vic. cap. 40, which was carried into full effect by the Indian Act No. V. of 1852. The statute provided a mode in which marriages might be celebrated, and all marriages solemnised under its provisions were to be absolutely valid. It contained, however, a proviso to this effect: 'Nothing herein contained shall invalidate or affect any marriages which, under the law for the time being in force in India, might have been there solemnised in case this Act had not passed.' So that the statute did nothing to resolve the question—which affected many Europeans and nearly all Native Christians—what was the proper legal view of marriages which were celebrated independently of its provisions? A course of legal decisions had rendered this question one of extreme gravity. In a celebrated case, well known to lawyers, which was thoroughly analysed by Mr. Anderson in the exhaustive speech which he delivered at the final reading of his Bill—*The Queen* v. *Millis*[1]—the majority of the English judges advised the House of Lords that under the English common law, *i.e.* the law as unaffected by statutes, the presence of a person in holy orders was essential to the valid solemnisation of a marriage. There was, however, a dissenting minority of judges, and it included names of such eminence and authority that the question was regarded by lawyers as far from finally settled. And shortly afterwards the Supreme Court of Bombay, and Dr. Lushington in the English Ecclesiastical Court, decided that, whatever were the state of the common law in England, it could not be held to extend to colonies and dependencies like Australia and India, not even to the presidency towns, which are subject to so much of

[1] 10 Cl. & F. 534.

English law. Of course the reasoning of these courts applied with tenfold force to the marriages of Native Christians in the Mufassal, who own no inherited or local allegiance to the English common-law. On the whole, the better opinion seemed to be—although the whole subject was beset by doubt—that Native Christians might lawfully marry by a contract, to use the technical expression, *per verba de praesenti tempore*, *i.e.* by any words or forms showing a present intention to marry; and whether the marriage was legal or not the majority of them did, I believe, so marry.

Up to this point I have been speaking of the marriages of Native Christians under ordinary circumstances—not of Native converts wishing to marry under the circumstances contemplated by the Bill. What then was the position previous to the Indian legislation of 1864 in regard to marriage of a convert deserted or repudiated by his unconverted wife? Sir B. Peacock held that he could not be married in the presence of a marriage registrar under the Act of Parliament, and considering the purely English point of view from which the Act is conceived and drawn I think he was right—at all events, I bow to his opinion. But the doctrine is of no importance, because there was no necessity for marrying under the Act, and in fact the great majority of converts were simply married by missionaries according to the simple forms which they considered suitable to the solemnisation.

It is right I should add that, till five or six years since, it is possible that a Native Christian who had re-married during the life of the heathen wife might have been punished for bigamy in the English sense, if he ventured within the jurisdiction of one of the Supreme Courts. This is a consequence of the wide language of a statute of George IV.,[1] which, however, was never intended to apply to such a case, but was meant to put down the scandalous practices of a very different class of people. The Act, indeed, is a good illustration of a peculiar grievance of the Native Christians. The draftsmen of the British Parliament, in order to escape the long circumlocutory phraseology necessary for the description of all classes of Europeans in India—East Indians, colonists,

[1] 9 Geo. IV. c. 74. s. 70.

and so forth—fell into the habit of using the term 'Christian subjects of Her Majesty,' and thus laws have more than once been made applicable to Native Christians quite foreign to their circumstances and position. There is an instance in an Act of Parliament passed this very last session. But, however that may be, the statement I have made about the Act is of no practical importance, because an enormous majority of Native Christians never came near presidency towns, and because the statute has been repealed by the Penal Code.

Here is section 494 of the Penal Code: 'Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.'

The Code, therefore, it will be seen, makes everything turn on the civil invalidity of the second marriage, on its being civilly void because of the first. At the present moment, the Acts of 1864 and 1865 do make the second marriage civilly void, but how did the law stand before 1864? On what ground could it be contended that the marriage of the convert leaving his heathen wife was void? Putting aside for a moment those difficult questions turning on the effect of Native matrimonial law in operating a divorce through conversion, it could only be on one ground, that there was something in Christianity which forbade a Christian to have two wives at once. Now I know there are many here who will only consent to derive their law of Christian life direct from the Bible, but, so far as law is concerned—though I may surprise some by the statement—there is no codex, no body of express rules setting forth discipline, except the Canon Law, which is accepted by the courts of even Protestant countries as authoritative on the point where it has not been expressly dissented from. Now, the Canon Law, while laying down the general rule, does permit a convert to re-marry during his first wife's life where she deserts him on religious grounds. In fact, the definition of the Penal Code before cited let in the delicate theological point to which I will advert presently.

Indeed, I must go further. I feel the scandalousness of the position; but I am not sure that a Native convert might not lawfully have practised polygamy. It may plausibly be contended that a Native of India, converted to Christianity from a religion which permitted polygamy, did not by the fact of conversion so change his legal status as to render invalid after it any marriage he might have contracted before. To apply the rule of monogamy to him is obviously impossible, for he might have had five or six wives before conversion, who would not have been less his wives after conversion.

Of course, I know that some of these propositions are disputable—indeed, it is part of my case that the whole subject was immersed in doubt—but I have stated my opinion, which I believe to be the better opinion, and it is some presumption in its favour that it corresponds with actual practice. For it is certain that these marriages were entered into freely by Native Christians, and nobody ever heard that a Native Christian was ever punished for marrying during the lifetime of the unconverted wife, or that any missionary was punished for abetting an illegality through marrying him.

This then was the state of the law. Every part of it was enveloped in doubt; doubt which affected all Christians, but Native Christians more than all. It was doubtful whether they were not bound to marry in the presence of a marriage registrar, which, considering their situation and circumstances, amounted to a prohibition of marriage; but again it was doubtful whether they could not marry with just as much or as little ceremony as was necessary to supply proof of intention. It was doubtful whether a Native Christian might not be punished for bigamy in the presidency towns for marrying when his spiritual guide told him such marriage was lawful; but again it was doubtful whether he might not with impunity continue to practise polygamy.

I hold myself dispensed from showing cause why the legislature should have interfered in such a state of things. What worse could its bitterest critics say of it, than that it declined to remedy evils so intolerable? Doubts concerning the validity of marriage are not simply serious on grounds of feeling, though everybody who has observed how much the

moral and religious views on this subject are affected by the legal view will consider them serious even on that ground. But they are formidable for the most solid reasons. Such doubts are doubts concerning the legitimacy of children; they are doubts concerning the guardianship of children; they are doubts concerning the descent and inheritance of property. And they are especially painful because, if the questions involved in them are wrongly solved, the error or negligence of the parents is visited on unborn generations. The danger meanwhile was greater in regard to the Native Christians than any other class, because they were practically debarred from the only complete security against mistake, marriage under the Marriage Act then in force.

I cannot see what the Indian legislature was good for, if it felt itself unequal to placing the law of Christian marriage on a satisfactory footing. However that may be, nobody now a member of the Government or of this Council is responsible for the beginnings of the undertaking. As soon as the three great codes—the Penal Code, Civil Procedure Code, and Criminal Procedure Code—were completed, it was felt that the law of marriage was the next great body of rules which it was urgently necessary to consolidate and put in order; and Mr. Ritchie, my predecessor in office, was for months before his death engaged in drawing a Marriage Bill, much of which is now embodied in the Acts of 1864 and 1865. Mr. Ritchie's papers were left imperfect at his death, and hence I cannot be sure that I have gathered his intention from the indications they furnish; but I am under the impression that he intended to bring all Native Christians under the same law as Europeans in respect of the formalities of marriage. But when he died, and the papers were transferred to Mr. Harington, he saw the practical impossibility of suiting to the circumstances of Natives any system, however liberal and elastic, which fitted Europeans, and Mr. Harington accordingly added the provisions which now appear as Part IV. of the Act in force, under which licences to solemnise marriages are to be freely issued to respectable persons, whether laymen or clergymen, by the local government. The celebrant is to report the marriages he has solemnised, but is not bound to use any

special form. He is, however, obliged to see that certain conditions are satisfied by the person he marries, and here occurs the provision which has rendered this Bill necessary. The person wishing to marry is not to have a wife or husband already alive. Now, as Mr. Harington's opinions are known, I presume he intended a very simple settlement of the question, and meant to prohibit converts from re-marrying pending the lifetime of the unconverted wife. But when the measure passed into Mr. Anderson's hands and went to committee, I need not say that the wisdom and justice of this prohibition were sharply denied; probably the majority of the committee were adverse to the prohibition. But it was seen that to settle the question at once would be to delay indefinitely an urgent reform. The situation of the Native converts was unsatisfactory, but the general state of the law of marriage was still more unsatisfactory. Accordingly, the course followed—not only justifiable, but in my opinion the only one which could have been taken—was to declare in the Bill the general rule, that a Christian should have but one wife; but to leave the special case of a convert repudiated to be dealt with separately. When the Bill came into Council, the Lieutenant Governor of Bengal was not satisfied with a mere understanding, but tried to introduce words into the Bill intending to pledge the Government to take up the question. I opposed, on the technical ground that it was not constitutional for the Council to force the Executive Government to any particular course, and the Lieutenant Governor withdrew his motion. But it appeared to me, and I state it now, that every member of the Government and of the Council engaged by implication that this exceptional case should be fully gone into, though of course no pledge could be given as to the special mode of settlement. No sooner did we get to Simla than the Lieutenant Governor pressed for the fulfilment of the engagement. An answer conveying a pledge to legislate was given on August 27, 1864, and on the very first day of the sittings of 1864–65 I redeemed the pledge by moving for leave to introduce this Bill.

If I have had the good fortune to make myself intelligible to the Council, it will result from my statement that the

discussion on which we are engaged to-day is not merely the supplement to, but actually part of, the discussion which took place when the Marriage Act was under debate. No objector to the Bill is entitled to take advantage of the fact that the re-marriage of converts repudiated by heathen wives has for two years been illegal in India. That is a mere accident arising from the impossibility in India of holding continuous sittings of the legislature. We must recur to the situation in which we found ourselves in the spring of 1864. We must consider ourselves as having laid down the general rule (to which who will object?) that a Christian can have but one wife, and we must regard ourselves as proceeding to consider the special case of the repudiated convert. This is the true position of the question to-day, and it is important to bear it clearly in mind for the following reasons. It alters the burden of proof. Many of the excellent persons who have addressed us in petitions are under the impression (perhaps not an unnatural one) that it is for the Government, or for me, to justify the principle of the Bill. But strictly speaking this is an incorrect view. The liberty of re-marriage must be considered as enjoyed by the Native Christians, certainly in practice, and probably under sanction of law, and it is for those who would sweep it away to prove their case, and it is for those who would abridge it to justify by argument the limitations which they would place upon it.

If I had any reason to think that this measure would be opposed, I might stop there, and leave to opponents what I am sure would be the extraordinarily difficult task of establishing a case against the Bill. But as I do not anticipate any opposition, I will, as briefly as I can—and, so to speak, under protest—advert to the objections which might be urged against me, as I collect them from the papers which have been circulated through the Council. The first of these objections, and the most difficult to deal with, is the objection that the divorce and re-marriage of the convert are not permissible under the laws of Christianity. I call it the most difficult to deal with of all, not because it is unanswerable, but because—even if I were competent to answer it—I could not make out a case conclusive to the minds of those who use

it unless I travelled into topics which cannot be handled in a Council composed as this is. Although, however, I cannot hope to convince those who doubt the lawfulness of the measure, I venture to think I can point to a weight of authority in favour of its principle which must at all events show them that the question must be considered as settled, so far as any secular legislature is concerned. The exact point I hope to prove is that, as a matter of fact and as a matter of history, no church or religious community in all Christendom has ever given a decision or an opinion on the question involved, which decision or opinion has not been in harmony with the Bill.

The first religious community which I shall mention as having ruled the point in favour of the view taken by the Bill is the Roman Catholic Church, and I mention it first because its doctrine is based on the Canon Law—which is all-important in this discussion—and which declares divorce lawful under the circumstances, and even settles a procedure to be followed. And here I must express my surprise at the language held by some of the critics of the Bill about the Canon Law. They seem almost to suppose that its authority being in favour of the Bill ought to militate against it, rather than otherwise, in the eyes of Protestants. Now I always thought it almost a commonplace in ecclesiastical law that, where the Canon Law has not been expressly dissented from by the Protestant churches, its authority on points of discipline like this is held by them to be not only great, but paramount. At present, however, I will merely cite it as proving that the Roman Catholic Church considers the divorce of a convert repudiated by his heathen wife to be lawful.

Mr. Maine then proceeded to quote authorities showing the concurrence of other religious bodies in this view. He said that, although the information which had reached him was imperfect, he had no doubt that the Greek Church held the same doctrine on the point. After observing that the dogmatic statements of Luther and Calvin on points like this were held binding by the Continental Lutheran and Calvinistic Churches, Mr. Maine quoted opinions to the same effect from Luther and Calvin. He also cited Melancthon, as being

the draftsman of the Confession of Augsburg. For the opinions of the Scottish Presbyterian Church, the English Presbyterians, and the various dissenting religious bodies descended from them, he appealed to the Westminster Confession, observing that the text on which the controversy turned was quoted in the margin at the passage which bore on the point in the earliest editions. The only religious community which had not pronounced dogmatically on the point was the Anglican Church, but it was one of the characteristics of the Anglican Church only to pronounce on emergent questions. Its doctrine on other points was to be collected from its learned authorities, and which way the weight of learned authority inclined might be seen by the opinions of English divines quoted in the pastoral of the Bishop of Calcutta,[1] whose own adoption of the view taken by the Bill might indeed be regarded as establishing what was the voice of learning. The simple fact was, there was no authority whatever the other way, good, bad, or indifferent. Mr. Maine did not complain of the opposition to the Bill offered by a few missionaries and a considerable number of Bengal chaplains; but it was quite idle to suppose that every man could form a satisfactory opinion of himself and for himself on a point of discipline which for century after century had been of interest to all Christian churches alike and upon which it had never occurred to them to differ. At all events, all Christendom being on one side and these gentlemen on the other, a mere legislator must be guided by the voice of Christendom.

Mr. Maine proceeded: It is objected to the Bill—and this is the second objection which I will notice—that it is only required by a small number of converts. Here I will say that, if I made any concession to the opponents of the measure, it would be that the general language of some of its friends as to the number of cases in which divorce is actually required has been somewhat too strong. But then the number, though not extraordinarily great, is still very considerable, and it is sure to increase, for both the causes which bring the husband over to Christianity, and the influences

[1] The Right Rev. Dr. Cotton.

which keep back the wife, are steadily growing in strength. And, indeed, even were the area of the grievance smaller than it is, it is always most difficult to apply statistics to a grievance which, though felt by a few, is probably felt by those few as quite intolerable. But the truth is I claim, as cases making in favour of the Bill, all the instances in which, under the present system, the wife comes over of herself—voluntarily, as it is called. It is a very inadequate view of this Bill if it be only regarded as a Bill for dissolving the marriages of Native Christians. It is in its main features a Bill for the restitution of conjugal society, and the great merit I claim for it is, that it substitutes a merciful and regular, for a cruel and irregular, procedure. The argument of the few missionaries who are opposed to it is that, in the majority of cases, the wife joins her husband voluntarily. The fact appears to be so at present, though, singularly enough, it appears to be unknown to the Native petitioners against the Bill, who evidently assume that the new law will for the first time give his wife to the Christian husband. But though she comes over, in what sense can she be said to come over voluntarily? The truth is, there is a procedure by which she is brought over, but it is a procedure involving the slight defect of moral torture or worse. It would be moral torture if it were only a conflict between affection for her husband and deference to the persuasions and misrepresentations of her kindred. But it is too often torture in another sense. What brings her over, is the intolerable life of the Hindú widow; what brings her over, is too often a course of life which has unfitted her for the society of her husband, as much as it has done for the society of her relatives who have at last driven her out. And if the procedure employed is sometimes aided by the expedients resorted to by her husband to communicate with her, I can only say that these expedients, as described to me, seem to me open to the gravest misconstruction. But for this procedure, cruel, capricious, and even scandalous as it is, the Bill will substitute a procedure, simple, regular and effectual. Twice within two years from the desertion the wife will be judicially asked whether she will join her husband; twice she will be solicited by her husband to come over,

but never *sola cum solo*; that was never intended, and those who have a contrary impression cannot have read the Bill. That is all it comes to; and yet so convinced am I that the cause which keeps back the wife in the majority of cases is not horror of the husband's person, but misrepresentation by others of his new mode of life, that I am sure this simple procedure, these few opportunities of explanation, will be enough to overcome her reluctance. No doubt there will be a small residuum of cases in which the husband will not succeed; but in these cases the absolute impossibility of restoring conjugal society may be taken for granted, and to these, and to these only, the provisions for divorce will apply.

I now come to what in the language of this country is called the political objection. Agreeing that it is just and right to give redress, does the situation of the English, of the British Government in India, admit of its being given? Now there are several gentlemen at this table whose experience of the country enables them to answer that question with far more authority than I can, but there are many things which lead me to think it would be very surprising if the question had to be answered in the negative. In the first place, the Bill has been framed upon, and moulded to, the opinions and suggestions of the Mahárájás of Vizianagram and Bardwán, and it would be strange if the British Government were compelled to greater tenderness for the obligations of rank and caste than our honourable colleagues. In the next place—and the Council will see that this consideration is likely to have some weight with me—a Native lady exposed to the full brunt of this procedure will undergo no sort of indignity which, if indignity it be, she would not have to suffer ten times over, if she were plaintiff or defendant in a suit for half a bígha of land, or indeed if she happened to know anything about it and her testimony were required. I hear it said on good authority that the agitation against this Bill—not very fervent or formidable—was commenced by some Native gentlemen attached to the bar of the Agra Sadr Court. Is it possible they can be unaware that commissions for the private examination of ladies of the highest rank issue every day in Bengal and the North-West, and that the commissioner is

often—is always, if it can be managed—an English gentleman of my own profession, who is quite as much an outcaste as the unfortunate husband? All the epithets which the tolerant habits of this Government permit our petitioners to repeat of the Christians with such complacency, that they are outcaste, degraded, and utterly unclean, apply in all their force to the barrister-commissioner, and the Native lady—though the form of a curtain may be between them—is exposed to the calamity, so much dwelt upon in the petitions, of breathing the same air with him; indeed, she is exposed to a process much more unpleasant than the solicitations of the unfortunate husband, a severe cross-examination. The Council must really not confound objections to the procedure of the Bill with objections of another kind—objections to a man's becoming a Christian. One of our petitioners (I do not agree with his opinions, but I will do him the justice of saying that he is a very honest man) has proposed that the offence of conversion to Christianity should be punished by seven years' rigorous imprisonment. I am afraid that this opinion pervades several papers which the Council has before it, and in which it is not avowed.

But whatever be the weight to be attached to the Native objections to the measure, I must make one observation on them—I entirely deny the right of the same person to make the Christian and the non-Christian objection at the same time. It is not permitted to argue that the Bill is not required because the majority of wives come over, and to argue in the same breath that their coming over is a grievous wrong to the Hindús. And it illustrates the levity with which some of the arguments against the Bill have been taken up, that it has been described as tending to make the heathen suppose that Christians think lightly of the marriage-bond. Why, the very objection of the heathen is that the measure does not treat the marriage-bond lightly enough. They have not the smallest reluctance to let the convert marry a new wife, or twenty new wives. What they quarrel with is the careful consideration shown to the first marriage and the first wife. It would be easy to silence, if not to satisfy, all the Native petitioners against the Bill—those excepted who simply object

to Christianity—by a simple excision of the sections which provide a procedure to be followed before divorce. But I cannot give up that procedure. I cannot give it up, in the first place in justice to the wife. I do not think the situation of a Hindú widow so happy, or that of a Christian wife so unhappy, that I can consent to leave her to her family unless in deference to her fully ascertained free-will. The missionaries and the converts are well informed as to the causes which generally keep the wife apart from her husband. It is no fanciful opinion about his outcaste condition ; it is misapprehension about his new mode of life—some miserable fable about meat, drink, or raiment, by which she has been deluded —which deters her. I cannot agree to leave her to her widowhood until at least an opportunity has been given of explaining these delusions away. Again, I cannot abandon the procedure in justice to the husband, for, if in law she is still his wife (which is the case supposed), I do not choose to assume that his sole object in suing her is to obtain facilities for marrying somebody else. Lastly, I am not ashamed to say that I will not surrender the procedure, because, while it is equitable in itself, it is in harmony with the theory of divorce in which so many Christian churches have concurred, and by which the Native converts and their advisers are, presumably, guided. That theory I understand to be, that while divorce on the ground of persistent heathenism is lawful, it is not lawful in cases where the civil law maintains the validity of the marriage unless some serious attempt is made to recover the wife's society. It is the more reasonable to make some concessions to the doctrines held by the converts, because I am convinced that, in regard to this particular matter, they obtain less than fair treatment simply because they are Christians. It is not only that we forget that they are a Native race, with many of the characteristics of all Native races, but we actually show them less consideration than other Native races. I am completely convinced that if conversions had been going on in some parts of India from Hindúism to Muhammadanism, and if the convert to Muhammadanism had entertained the same feeling as the Christian convert about his first wife (which one knows he would not), and

if the disturbances which would be the probable consequence had compelled us to legislate—I feel sure that a Bill applying this carefully guarded procedure would have been praised by all as eminently prudent, moderate, and equitable. But because the converts are Christians, every point is taken against them. For this reason I have been compelled to prove, I fear at tedious length, that they are entitled by their own religious laws to demand relief. Contingencies on which not a thought would have been bestowed if another Native race had been in question have to be carefully weighed and taken into account; the very molehills of Hindú prejudice are exaggerated into mountains, and difficulties which in everyday Indian life crumble away at a touch are assumed to be of stupendous importance. I know, of course, that we do this because the converts are of our own faith, and because we are tender of our character for impartiality. But I do not know that we are entitled to be unjust even for the sake of seeming to be impartial. Surely the duty of the British Government to the Christian converts is too plain for mistake. We will not force any man to be a Christian; we will not even tempt any man to be a Christian; but if he chooses to become a Christian, it would be shameful if we did not protect him and his in those rights of conscience which we have been the first to introduce into the country, and, if we did not apply to him and his those principles of equal dealing between man and man of which we are in India the sole depositaries.

[In moving the introduction of four sections giving an appeal to a respondent who denied the jurisdiction of the Court on the ground that the petitioner was not a Native husband or a Native wife, Mr. Maine said:]

It had been alleged by some of the petitioners that under their law also a marriage was dissolved by the conversion of either partner. That there was much difference of opinion on the subject might be inferred at once from the contradictory observations of Rájá Sáhib Dyál and the Mahárájá of Vizianagram. He might remind the Council that there was some antecedent presumption that, under Muhammadan law, dissolution of marriage followed conversion; for Muhammadanism was a system founded on conversion. It was therefore per-

fectly possible that the contingency of a re-conversion had been provided for from the first. But Hindúism was nothing of the kind. Hindúism was a social system sanctioned by supposed divine ordinances; and the inference was that membership in it was regarded as such a privilege that no one would willingly forego it. Hence all antecedent probabilities were in favour of the conclusion, that under Hindú law conversion would not operate as a dissolution of marriage.

He had gone through the opinions of the Pundits appended to the various petitions that had been received, and had done his best to draw a proper conclusion from them. To an English lawyer, all Hindú law appeared like law in the gaseous, or at most fluid, condition. But he had had the most learned assistance in India in interpreting the citations annexed to these opinions, and the conclusion he had come to was that in the earliest authorities there was no reference to conversion at all. They considered that a man might sometimes forego his birthright by stress of passion or necessity. But they did not seem to have contemplated that which we now call conversion—that is, the substitution of one set of alleged spiritual truths for another. It did not appear to have occurred to them that, by mere disbelief, a Hindú could give up the privileges to which he had been born. When you came a little lower, there were no doubt certain vague references to contemners of the Vedas: these passages were said to be pointed at the Buddhists or the materialistic sects; and certainly there were some of them in which the person guilty of the offence described was said, in a vague sort of way, to become an outcaste. It was now alleged that this language applied to the Christians, and in fact everything depended upon the correctness of this application. But even then the desired end was not reached, and it was only by a very long artificial chain of reasoning that we could arrive at the conclusion that a convert's marriage was dissolved. Dr. Duff, in a paper recently printed, had stated that 'the result of our inquiries led us to conclude that, while a change of religion did not absolve any convert, male or female, from a previous lawfully contracted marriage alliance, such change, in the case more especially of conversion from Hindúism, entitled the unconverted party to

treat the other (by Hindú law) as *civilly dead*, and, consequently, as *ipso facto* repudiated.' That might be so. But you could not put civil death above natural death; and yet it was quite notorious that, before the Widow Marriage Act,[1] in the opinion of the so-called orthodox Hindús not even natural death dissolved a marriage. They admitted that there were authorities in their works which seemed to show that a widow might re-marry when her husband became an outcaste, or was dead; they argued that those passages which had once been binding had ceased to confer liberty or create obligation. This was the *Kali Yuga*, the fourth age,[2] and there were many liberties once enjoyed which had been abrogated. It did seem to him, so long as this theory of a *Kali Yuga* was maintained, it was quite impossible to come to a positive conclusion on any point of Hindú law that had not been sanctioned by constant usage or decided expressly by judicial authority. However, he did not put himself forward as an authority on Hindú law; and the practical conclusion he came to was that the decision of the question, whether or not, in the case of a Hindú, conversion operated as a dissolution of marriage, was one which must be left to the courts, and the section which he proposed to move would facilitate the attainment of the requisite decision.

There was another course of reasoning which he had to meet. 'You admit,' it was said, 'that by Hindú law a convert to Christianity becomes an outcaste.' Now, in fact, this was a proposition which Mr. Maine neither affirmed nor denied; but assuming it to be sound, it was said you ought to carry the doctrine farther, and grant a divorce as a logical consequence of the husband's outcaste condition. That brought us to the important question which met us constantly in legislation—the question, what were we to do when we came upon a rule of Native law to which we objected on strong moral grounds? Mr. Maine confessed that on moral grounds he objected to the Muhammadan rule of divorce by conversion, and as regarded persons becoming outcastes by conversion from Hindúism to Christianity many of the Native gentlemen who signed

[1] Act XV. of 1856.

[2] It began on February 18, 3,102 years B.C., and is to last altogether 432,000 years.

the petitions were sensible men and must understand that it was absurd to expect the members of the British Government quite to hug this theory to their hearts. Perhaps ours was the first Government that had ever allowed its subjects such ample freedom of expressing their opinions as to its religious position. What then was to be done? Mr. Maine said that the clear rule was to accept these objectionable positions as we found them, and if they were clearly established, we did not make them, and were not responsible for them. But we should not go a step further. We should not turn the objectionable rule into a basis for further legislation. We should not put a legislative superstructure upon that which we considered morally unsound. If we once began legislating, we could not, he repeated, avoid the necessity of declaring what *ought* to be. The practical result of the amendments which he proposed was to enable a court of law to declare, with regard to Hindúism as a whole, or any particular Hindú sect, or any of the non-Hindú religions of India, whether a convert's marriage was dissolved by the fact of conversion.

SPECIFIC PERFORMANCE

NOVEMBER 11, 1864.

THE withdrawal of the Bill relating to fraudulent breaches of contract (supra, p. 86) was regarded by Mr. Maine as implying a pledge that the civil procedure of India applicable to contracts should contain rules as to their specific performance. With this view he drew four sections which were inserted in a draft Code of Civil Procedure prepared by Mr. Harington. After referring to these sections, which never became law,[1] he proceeded as follows:

I now pass to the principle involved in the specific performance of a contract—which I need scarcely say to the Council is its actual or exact performance—the doing of the very thing promised to be done as opposed to the right to recover damages for the non-performance of that promise. From the plaintiff's point of view, nobody, I suppose, would

[1] The Indian law on the subject is now contained in secs. 12–30 of the Specific Relief Act, 1877, a useful measure enacted while Mr. (now Lord) Hobhouse was Law Member of the Governor General's Council.

deny that the specific performance of his contract is what abstractedly he is entitled to, and not the recovery of damages, which, probably, neither he nor the defendant contemplated when the contract was made. Hence, it is practically found that in proportion as a system of law aims at doing perfect justice to all parties, it leans towards specific performance, and takes the stress of its remedies off damages. To take some examples: the English courts of common law, which, with many practical excellencies, have, it must be owned, but an imperfect theory of justice, had originally no power of enforcing specific performance, and only lately acquired it by statute.[1] But the English Court of Chancery, which, with many great and grave defects, has a more perfect set of principles than the courts of common law, has always ordered and still orders specific performance in cases where damages would be an insufficient remedy. (Mr. Maine here quoted a statement of the principle from a judgment of Lord Hardwicke's,[2] and continued:) I do not wish to invite the attention of the Council to merely technical points. But I may say that the action of the Court of Chancery in matters analogous to that before us cannot be understood without taking into account its system of injunctions, under which by ordering a man not to do a particular thing, it virtually tells him what to do. I freely admit, however, that both as regards specific performance and as regards injunctions, the Court of Chancery exhibits more timidity than would be inferred from the amplitude of the language in which the Judges declare the principle; and doubtless the smallness of the transaction would be a reason for the Court's not interfering. The reason of that I take to be this:—The Court of Chancery, much as it has been reformed, is still a great and complex machine, difficult to be put into motion, and not always certain of operation when it does move. Many of its rules still savour of the doctrine, which does credit to its modesty, that a Chancery suit is a great evil, not to be encouraged if not to be discouraged. But, when we come to

[1] Mr. Maine probably referred to the jurisdiction to enforce specific performance of contracts to refer to arbitration, which had been given by the Common Law Procedure Act, 1854, sec. 11.

[2] Possibly that in *Buxton* v. *Lister*, 3 Atk., 383.

systems of codified law, with a procedure much cheapened and simplified, we find no such hesitation in decreeing specific performance. Accordingly, the French law, which is now the law of the greater part of Europe, will always order specific performance when the defendant is able to perform.[1] And so little difficulty do the civil courts make about decreeing it that I myself remember a French court ordering an eminent author to write a novel, in six volumes. And as there are some persons who appear to think that there is something unpractical about a highly simplified law of procedure, I may as well go on to say that M. Dumas did write the novel. But, unquestionably, the most advanced law on the subject is contained in the Code of Civil Procedure. For as I read the sections 192 and 200 of the Code,[2] the right of an Indian Mufassal court to decree specific performance is exactly co-extensive with its right to decree damages. So that, as the law stands at present, damages for a breach of contract to marry being unquestionably recoverable in India, a court of justice may order a man to marry a particular woman, and may imprison him if he declines.[3] And it illustrates the value of the censures which have been directed against these sections of mine as innovations designed in the interest of the planters, that when we get into committee I shall have to ask my honourable friend to allow the law to be narrowed, and certain classes of contracts to be excluded from the rule.

I know it will be said that the question in India is not whether an order for specific performance is just to plaintiffs, but whether it is just to defendants. I say that it is just to defendants, and eminently just and eminently kind to poor defendants. See how specific performance operates. In the first place, under the existing Indian law the defendant has the same ground of defence in opposing a decree for specific performance as he has in opposing a decree for damages. Next, the court cannot order specific performance of a

[1] See the *Law Quarterly Review*, viii. p. 251. The note in Fry on *Specific Performance*, 2nd ed. p. 669, seems incorrect. As to the German and Dutch laws of Specific Performance, see *Anglo-Indian Codes*, I. p. 931, note 1.

[2] Mr. Maine refers to the Code then in force, *i.e.* Act VIII. of 1859.

[3] It seems that in some German States orders may be made for the specific performance of a contract to marry. See the *Law Quarterly Review*, viii. 252.

contract unless it is satisfied that the defendant in fact is able to perform it. Here is the great safeguard and protection of poor defendants. A decree for damages has this characteristic of a criminal penalty, that it issues unconditionally, and without regard to the circumstances of a poor defendant, who must pay or go to prison. But an order of specific performance is moulded to the circumstances of the person against whom it issues. I am not afraid to face the question which is no doubt in the minds of the Council, and to ask what is the effect of a system of specific performance as compared with a system of damages, as between planter and ryot. It is this. The planter obtains a decree for damages and executes it. He seizes the ryot's bullocks, his plough, and his brass pans. They are worthless to the planter—but to the ryot, if what is said of him be true, if he be a mere *adscriptus glebae*, living from hand to mouth, they must be invaluable—they must be the very means of living. Now, what worse could one say of a remedial system than that it inflicts the maximum of injury on the defendant, and confers the minimum of benefit on the plaintiff? Suppose, however, the decree is not executed: it is then hoarded up and kept hanging *in terrorem* over the ryot. I have no hesitation in saying that a system of perpetually unexecuted decrees is sufficient to keep an open sore eternally running in society.[1] Can such a system be compared with one of redress by specific performance? Is it not infinitely better that the Court should step in, and when the defendant has shown the first symptoms of intending to commit a breach, order the contract to be performed, at the same time taking away none of his rights of defence?

Just see what the case is. It is not that of a man who, when he made the contract, did not intend to perform it. That is a punishable offence under the Penal Code. Nor is it the case of a defendant who, from unforeseen circumstances, becomes unable to perform his contract. For it would never be possible for the plaintiff to show the power of such a defendant to perform the contract, and conse-

[1] Sections 230 and 266 of the present Code of Civil Procedure have abated the evils here referred to.

quently no order for specific performance would issue. The case is that of a person who, when he made the contract, did intend to perform it, but subsequently changes his mind. Surely, the sooner the Court steps in after the original intention has been formed, and obviates the change of intention, the better it is for the defendant, and certainly the better for the interests of morality. But I should be sorry that the Council should suppose that all I have said is mere theory and speculation. The advantageousness of a system of specific performance to poor defendants I know from personal observation. Look to the English county courts. They were established, not to supply the defects of the Court of Chancery, which at that time were regarded as incurable, but to supply those of the courts of common law. Consequently, they possess by law no power of awarding specific performance of contracts.[1] But still, insensibly, progressively, against the law, and without fixed intention on the part of the judges, by the mere force of commiseration for the poor they have become courts awarding specific performance. The judges, seeing much of poor men, and, like all who see much of them, contracting a sympathy with their troubles, become unwilling to make unconditional decrees for payment of damages, and, consequently, for imprisonment. This is what constantly occurs in certain parts of England. An artisan has contracted to execute a piece of work. If it was in Coventry, it would be some lengths of ribbon; if in Nottingham, a pair of shoes. He has broken his contract, and is brought into court. Legally the judge can only condemn him to pay damages and consequently to go to prison. But practically, if he finds that the defendant can still execute the contract, he adjourns the case and gives him time to perform it. In other words, without law he decrees specific performance. Knowing this, I was not surprised when I learned in spring what was the plan which the first practical jurist of England, Lord Westbury, had devised for the relief of the poor from the coarse machinery of the county courts. The Lord

[1] This was so in 1864. But by the County Courts Act, 1865, sec. 1, all the jurisdiction of the Court of Chancery in suits for specific performance of contracts of sale was expressly given to the County Courts when the purchase-money did not exceed 500*l.*, and now see the County Courts Act, 1867, sec. 9.

Chancellor's Bill was avowedly designed in the interests of poor defendants; and I have seen it asserted that it was thought too favourable for defendants, too unfavourable for plaintiffs, and that it consequently was postponed. Here is the English Bill, and its principle is to lessen the power of these courts to award damages and, consequently, imprisonment, and to give them all the powers of the Court of Chancery, and amongst them that of awarding specific performance. Indeed, making allowance for the difference of procedure in the two countries, and the consequent difference of form in the Bills, it may almost be said that these very sections, which have been condemned in India as devised in the interest of the rich, have been transferred to the English Bill in the interest of the poor. Both Bills are, at all events, founded on a principle which I at least have always contended for as applicable to jurisdiction over the poor, that of taking the stress of judicial remedies from damages, and of freely employing those equitable remedies which can be moulded to the situation of persons and to facts.

I know, however, what may still be said to me, that this is all very plausible, but that there is a part of India in which unjust contracts are made. Let us assume those contracts to be as unjust as they are alleged to be. Are you going to keep the whole procedure of India in a backward condition because unjust contracts are made in a corner of Bengal? Even there the probability is that the majority of contracts are perfectly fair. But I maintain that, even as regards unfair contracts, a system of specific performance is better than a system of damages, and that the more scientific instrument will inflict the less deadly wound. I have, however, for myself no objection to state what further expedient I would employ to solve this ever-recurring contract difficulty. I would provide courts and judges of such capacity that, while on the one hand you arm them with the utmost resources of civil procedure, on the other they shall be able to recognise and take cognizance of equitable defences in suits for breach of contract, as distinguished from legal and formal defences. Our Mufassal courts are courts both of law and equity; and, under a proper administration

of justice, every contract to which there is a real moral objection should be worthless to the holder. It may be said there is not sufficient judicial material for this in India. But surely if society in a part of Bengal is so exceptionally constituted as to arrest the improvement of your general civil procedure, the logical inference is that that part of the country should be exceptionally dealt with; that your judicial strength should be concentrated there; and that more than usual facilities should there be provided for scientifically administering the law. Many other nostrums are about, but I have a profound disbelief in all of them. The only remedy which I hold to be sovereign is the application by competent courts of those tried and tested principles of jurisprudence which alone are capable in matters of contract of mediating between man and man.

In 1868, Mr. Maine again discussed the subject of specific performance. The Indian Law Commissioners, deeming specific performance to be more allied to substantive law than to procedure, had inserted sections dealing with the matter in their draft code of the law of contract. Mr. Maine dissented from that view, omitted the sections from the Commissioners' draft, and wrote the following Minute in support of his action:

APRIL 9, 1868

After very carefully considering the fourth report of the Indian Law Commissioners, and particularly the first portion of it, I cannot help feeling much uneasiness on two points.

I am afraid, in the first place, that the report may produce an impression that, in omitting certain draft sections relating to specific performance and injunction from a Bill which it became my duty to conduct through the legislature, I have been guilty of some discourtesy towards the Commissioners, or some disregard of their undoubted claims to respect. The Viceroy, indeed, and my honourable colleagues will not suspect me of any such lapse from duty and good taste, for they, or most of them, are aware how earnestly I have striven to prevail on the legislature to sanction the Commissioners' drafts with the minimum of change; and they will believe me when I say that, in making this effort, I have often had to

contend against criticisms which were at least plausible, and to struggle with difficulties which, however slightly they may be believed in at home, are still real and substantial, and not the less real and substantial because they assume a form somewhat unlike that of the obstacles which impede legislation in England. There may, however, be readers of the report who have no particular reason to give me credit for the strongest desire to give effect to the recommendations of the Commissioners. I wish, therefore, again to state that the omitted sections are at variance, both in respect of substance and in respect of place, with certain provisions of the existing Indian Code of Civil Procedure. The fact that all I have done has been to maintain against the recent proposal of the Commissioners the law and the arrangement of a code which has been seven years in force in India, and which even the High Courts are bound by their letters patent to follow, seems to me conclusive on the question of courtesy and deference. I appeal to that fact on this question alone, for I do not deny that there may be good reason for changing the law, or for altering its place, or for both.

There is an impression of another kind which may have been created in the minds of my colleagues, but which I am most anxious to prevent or dispel. The language of the Commissioners may have been affected by the form of their observations, contained as they are in a report addressed directly to Her Majesty; but whatever be the cause, this language is so unqualified and peremptory as to lead perhaps to a suspicion that, taking advantage of my official position, and possibly of some credit which may attach to me of having given special attention to a particular class of studies, I have, in denying that the proper place for the omitted sections was a code of substantive law, put off on the Government and the legislature a trivial or careless opinion. I must, therefore, attempt to show my colleagues how far my assertion was one to be disposed of in three brief paragraphs. I regret that the discussion must necessarily be of a kind which can scarcely be attractive to persons unfamiliar with the inquiries on which it turns.

The argument of the Commissioners is as follows :—

'To enforce the specific performance of some contracts is impossible; of others it is inexpedient. It is the province of a code of substantive law to define the rights and liabilities of parties arising out of their contracts, and in so doing to specify what contracts may and what shall not be specifically enforced. This is no part of procedure. The proper province of procedure is to point out the mode in which effect is to be given to rights already defined, and not itself to define those rights.'

The distinction here indicated between rights and the modes of enforcing them originated with Bentham, and is the foundation of his distribution of law into substantive and adjective. It is the commonly received distinction, and it undoubtedly determined the arrangement of the New York Code. If I could bring myself to accept it as rigorously correct, it is possible that I could bring myself to acquiesce in the conclusion of the Commissioners. But on the authority of Mr. John Austin, I decline (and, if my own opinion were of the least consequence, I might add that I have always declined) to admit the possibility of establishing a complete distinction between rights and the modes of enforcing them; and on the same authority I deny that any such distinction can be made a basis for strict legal classification.

Mr. Austin is the only writer on jurisprudence whose opinions outweigh Bentham's in the few instances in which they differ. Since he has been quoted by the Commissioners as an authority against me, it is proper that I should indicate by precise references to his published writings what his opinions really were. While Austin (vol. ii. p. 291) was not prepared to abandon expressions so convenient as substantive and adjective law, he denied the validity of the distinction on which this distribution of law rests (vol. ii. pp. 451, 452 *et seq.*), assigning, among many conclusive reasons for his denial, the undoubted fact that there is a large class of rights which cannot be completely distinguished from the procedure by which they are enforced. The proper distribution of law, apart from the law of status which occupied a peculiar place in his system, Austin (vol. ii. p. 454) declared to be into (A) law 'regarding rights and duties which do not arise from

injuries or wrongs, or do not arise from injuries or wrongs directly or immediately,' and (B) law 'regarding rights and duties which arise directly and exclusively from injuries or wrongs.' A code or a part of a code corresponding to A would not widely differ from a code of substantive law as understood by Bentham. A code or part of a code corresponding to B would include procedure (Austin, vol. ii. p. 454), and so far as it related to civil law would not largely differ from a code of adjective law or civil procedure. But between either code as understood by Bentham, and either code as understood by Austin, there would be differences, and it is exactly on these differences that the whole question turns in the present case.

So far, nothing probably seems more remote from popular ideas than Austin's language and reasoning. Yet the truth is that Austin's distinction between the two great departments of law answers much more nearly to popular conceptions than does Bentham's. Austin explains that the foundation of his classification is the *fact* that obedience to the law is imperfect (vol. ii. p. 453). Code A on Austin's system declares rights on the assumption that everybody gets his rights. Code B declares and defines rights and duties which suppose that obedience to the law is not perfect, and which arise entirely from that imperfection of obedience. This is a real distinction and easily understood; while it may be doubted whether Bentham's is more than verbal, and when carried into detail it certainly occasions not a few perplexities.

Now, in which code, A or B, would Austin have placed the specific performance of contracts? His language appears to me not to leave room for a doubt on the point. He describes (vol. i. p. 101) the right to compel specific performance as a 'right arising from a civil delict which is an infringement of a right *in personam*.' He would therefore have placed it in code B, in which he would also have placed mere procedure. And here I take the liberty of recalling to mind the language I employed in my statement of objects and reasons: 'If we suppose that a code of substantive civil law and a code of civil procedure were being framed simultaneously, and that the framer of the codes had the power of

placing the law of specific performance in either code, there cannot be much doubt that he would consider it *as cognate to* procedure rather than to substantive law.'

Is there anything in the treatment of specific performance by the Commissioners which implies that they take a different view of its nature? I venture to think that there is not. On grounds of morality alone they cannot for a moment be supposed to have intended to lay down that the law releases a man from the exact performance of his contracts in all except the very few cases in which they allow him to obtain a decree for specific performance or an injunction against a breach of his engagement. They have obviously treated the right to specific performance as a right arising out of the actual or threatened violation of the rights created by contract—as a 'right of action,' which, as Austin says (vol. ii. p. 455) 'cannot be completely distinguished from the action or procedure which enforces it.' Of all such rights it may be doubted whether there is any one so dependent on the mechanism of courts as the right to specific performance. I do not think it would be very incorrectly described as being, not a primary right, but a mere limitation of a primary right, arising out of the necessary or artificial imperfections of procedure.

The impression that Austin would have classed specific performance with substantive law has arisen, I venture to think, from its not having been perceived that his acceptance of this very expression 'substantive law' was only provisional and under protest. The passage which occurs at vol. i. p. 101 might perhaps appear to bear out this impression, if Austin had written nothing more. But it is only part of a syllabus of lectures. The lectures themselves have been more recently printed in vol. ii., and they seem to me to show that Austin's views admitted of no construction except that which I have put upon them.

I ought perhaps to anticipate the argument that there are signs in their draft chapter on contract that the Indian Law Commissioners, like the New York Commissioners, had accepted Bentham's distinction between substantive and adjective law in Bentham's sense; and that I was accordingly

bound to maintain it. But surely I may contend that, in subsequently quoting Austin against me, the Commissioners have justified my refusal to take Bentham's distinction except as modified by his successor. It must be remembered, too, that I was not simply required to place the law of specific performance in a code to which I ventured to think it did not properly belong; I was further required to take that law out of a code which is in actual operation, and in which I considered it rightly placed. It would be very uncandid not to add that I was glad of an opportunity of escaping from the grave political difficulty in which the proposal to enact the omitted sections was sure to involve us.

I can scarcely doubt that I have already wearied most of those whose duty it will become to read this paper, and on that ground alone I hesitate to point out why it is that the illustration taken by the Commissioners from criminal law does not, in my humble judgment, bear out the desired conclusion. But I have a further reason for not travelling into this subject. It is fully treated of in Mr. Austin's 'Remains;' and my object in recording this Minute is, not to argue against the Commissioners, but to rebut the inference which the brevity of their language may suggest by appealing to an authority to whom all who have bestowed the least thought on this class of inquiries will bow, and to whom they have themselves appealed.

I have not the same strong personal reasons for commenting on the last part of the Commissioners' report which have led me to observe at such length on the fifth, sixth, and seventh paragraphs. I do not, of course, admit that there is justice in the observation that all that 'is alleged against the omitted sections as a fault is, in effect, that under them specific performance of contracts for cultivation cannot be enforced by the imprisonment of the contracting cultivator;' but I should be the last person to deny that it is a fairly disputable point whether the Indian courts should be invested with extensive powers of decreeing specific performance. The grounds of my own opinion have been repeatedly submitted to the Secretary of State for India.

If I demur to the assertion that the limitations of the power to compel specific performance characteristic of one

branch of English law involve 'principles of universal application,' it is not for the purpose of controversial argument. Mr. Austin, indeed, had apparently a less exalted idea of the value of those limitations than the Commissioners; since, after promising to 'analyse the principles whereon specific performance is rationally compelled'—a promise no doubt fulfilled, though no traces remain of the mode of fulfilment—he adds, 'the caprices of the English law with regard to specific performance, and with regard to the connected matter of recovery *in specie*, I shall try to explain historically' (vol. i. p. 102). But it is on the ground of the practically dangerous consequences in India of the Commissioners' doctrine that, with all deference, I must enter my protest against it.

The principles of English law must, I submit, be taken to be the principles of English law as a whole, not of any one branch of it. Now it will not be disputed that, in England, the specific performance of small contracts is compelled, not by the civil, but by the criminal law; nor has there apparently been any hesitation in enforcing such contracts by criminal remedies on the ground that the matters contracted for amounted to a 'succession of acts, or the exercise of skill, or the application of personal labour.' Nobody can doubt that the Master and Servants Act of 1867 (Stat. 30 & 31 Vict. c. 141)[1] was passed with the most kindly intentions towards the classes affected by it. Yet what does it amount to but a far-reaching law of specific performance, ultimately enforced by three months' imprisonment in the House of Correction? India, however, is a country of small contracts; so that, if the principles of English law be of universal application, the case for a general penal contract law would seem to be complete. Nor is this a fanciful conclusion. The argument of the advocates of a penal contract law has, as a matter of fact, been that the penal contract law did to a very great extent exist in England, and that as the 'caprices' of English law, in distinguishing between one small contract and another, could not be transferred to India, the English law transplanted to this country would give a general penal contract law. The English Parliament, they said, has never

[1] See now 38 & 39 Vic. c. 86.

hesitated to compel the specific performance of small contracts by criminal penalties, whenever the public interest or the interest of some powerful class required it—why should the Indian legislature be more squeamish?

But India, if it is a country of small contracts, is also a country over which civil courts are comparatively much more widely and generally diffused than in England, and in which the habit of resort to the civil courts penetrates far more deeply among the population than it does in England. It is also a country in which there is reason to believe that the directions of a court, if express and specific, are, as a rule, obeyed without demur. Those who have thought that, by taking advantage of these peculiarities to give further extension to a principle which the English civil courts have themselves been obviously labouring of late years to extend, they could prevent the perpetual recurrence of a demand for the coarse remedies of the criminal law, may perhaps deserve charitable construction, even should the experiment never be tried or fail. If the enlargement of the law of specific performance proposed by Sir Henry Harington and myself, but condemned by the Indian Law Commissioners, had been carried into effect, it was intended to take steps for the repeal of nearly all the petty criminal contract laws which we have in India, including section 492 of the Penal Code and Act XIII. of 1859 (the Artificers Act), now extended to a great part of the country under the power contained in its fifth section. The object of the rejected scheme was, in fact, virtually to transfer to the civil courts the cognisance of the entire subject of contract.

I should perhaps be doing myself some injustice if I did not state that, out of the numberless questions raised by the Commissioners' drafts, this is the only one of the smallest importance in which, to the best of my recollection, I have not either entirely concurred with the Indian Law Commissioners, or waived my own opinion in deference to theirs. That there is some apparent presumption in differing from them, even on this question, I am not prepared to deny. There is, however, something to be said in mitigation of an unfavourable judgment. So far as this question is a question of policy, it is

probably the most fundamental of all Indian local questions, and one, therefore, on which a member of the Government of India may *primâ facie* stand excused for forming an independent opinion. So far as it is a question of legal classification, it is one on which I have bestowed much thought, and on which I years ago stated my views, both as a writer and as a teacher of law. So far as it is a question of legal improvement, I can only plead my strong impression (though of course on such a point my opinion has little weight in comparison with that of the Commissioners) that English lawyers were coming to a tolerably general agreement that the English restrictions of the right to specific performance were in a high degree artificial and arbitrary, or (to use Mr. Austin's expression) 'capricious.'

This minute is recorded mainly for the purpose of rebutting certain inferences or suspicions which might be suggested by the Commissioners' language. Meantime, it would be most indecorous that I should continue to question the Commissioners' views of the proper place for their sections, and it would be most unreasonable that I should ask the Secretary of State to decide such a matter authoritatively. Accordingly, as soon as the fourth report was officially communicated to this Government, I requested the committee of the Legislative Council to which the Bill embodying the law of contract has been referred to consider the omitted sections as fully and fairly as if they were included in the Bill. The committee complied with my request, and two of my honourable colleagues, Mr. Massey and Mr. Strachey, have been kind enough to record a statement that I spared no effort to do justice, on their merits, to the Commissioners' proposals. The result of the discussion in committee will no doubt be separately reported to the Secretary of State.

ABOLITION OF GRAND JURIES

NOVEMBER 18, 1864.

GRAND juries had long existed in Calcutta, Madras, and Bombay, and had become as obsolete and useless in India as they are in England. In those towns, indeed, grand juries were worse than useless; they were often obstructions to justice, and the grand jury list seriously depleted the list of petty jurors.

In 1864, therefore, the Government of India determined to abolish them, and to make the changes in the law necessitated by such abolition. For this purpose the Bill referred to in the following speech was introduced and became law as Act XIII. of 1865.[1] Under this Act the committing magistrate delivers to the Clerk of the Crown an instrument of charge signed by him, and stating the offence. The Clerk of the Crown considers the charge, and may amend or add to it. The charge is then recorded, and the person charged is entitled to a copy of the charge and of the examinations of the witnesses upon whose depositions he has been committed. Upon a charge so recorded he is deemed to have been brought before the High Court in due course of law, and, subject to certain provisions as to unsustainable charges, he is arraigned and tried. But when any charge shall, before the person charged is arraigned, appear to the judge of the High Court who would in ordinary course try the same to be clearly unsustainable, an entry to that effect may be made on the charge by the judge. Such entry has the effect of a *nolle prosequi* upon the charge, but shall not operate as an acquittal until three years have elapsed, when, if no fresh charge has been brought on the same matter, the person charged shall be considered as having been acquitted. The power of making such an entry is the substitute for the functions of a grand jury.

After introducing the Bill, Mr. Maine recommended the Council to refer it to a select committee for consideration, and, if necessary, amendment. He then proceeded as follows:

Meantime I shall have the opportunity of stating the real case against grand juries in India, which I confess I omitted to do in the statement of objects and reasons appended to the Bill. The truth is, I took for granted that in comparatively small and very busy societies, a system which occupied the best heads of a community with an inquiry conducted under such disadvantages as to defeat itself, and confided the mo-

[1] Repealed and re-enacted by Act X. of 1875. The present law on the subject of entries on unsustainable charges is in the Code of Criminal Procedure, Act X. of 1882, secs. 273, 403, expl.

mentous business of trying men for their lives to the residue, was self-condemned. But one of the things one learns in India is to take nothing for granted; and I will now attempt to say what grand juries really are, both in England and in India.

In the absence of any formal expression of opinion, I have only the presentments of the grand juries of two of the presidency towns. I may say, however, that the papers which have already been sent in show that a large majority of the barrister judges of the High Courts are in favour of the Bill. I have heard something of a presentment by the grand jury of Bombay. But as I have not actually seen it, I will not say anything about it. I am, however, able to say, on the authority of my honourable friend Mr. Anderson, that the Bill has been received with favour by all classes of the Bombay community. Here, however, is the presentment of the grand jury of Madras.

Mr. Maine then read the presentment, which was strongly in favour of the Bill. He proceeded as follows:

And here is the presentment of the grand jury of Calcutta, which certainly differs considerably from that of the grand jury of Madras:

'The grand jury beg leave to present that they have learned with extreme regret, as well from your Lordship's charge as the public journals, that a Bill, having for its object the abolition in India of the institution of the grand jury, has been introduced by Mr. Maine, and obtained the sanction of the Government, and is therefore likely to become law. The grand jury cannot separate without giving an emphatic expression of their unanimous opinion that such an interference with a time-honoured institution is premature and unwarranted. Whatever may be the case in England, where the institution in question is still maintained in all its integrity, the time, in the opinion of the grand jury, has certainly not yet come when in India the grand jury is no longer, to use your own words, "a necessity for the purpose of guarding the subjects from oppression on the part of the executive government, to protect the individual from the aggressive conduct of men in power, whose purposes would be sufficiently met by the fact of the obnoxious person being placed on trial in open court on a criminal charge." The grand jury think that this has been sufficiently demonstrated by actual cases of no remote occurrence; nor is there any guarantee that here in India we may not again be placed in such times (to quote once more from your Lordship's charge) "of great public commotion and excitement, when it may

be necessary for the executive to use extraordinary and indeed despotic powers against the liberty of the subject, under circumstances which would imply that the magistrates ought not to be trusted unchecked in the exercise of arbitrary power." The grand jury are further of opinion that the object of the presentment of a former grand jury has been sufficiently, and to all intents and purposes, met by the extension of the summary jurisdiction of the police magistrates. And believing, as they do, that the measure in question, if carried into effect, would be fraught with danger to the liberty of the subject, they beg most respectfully to present that, in their judgment, the Bill ought not to be passed into law.'

Now, sir, I trust that the highly respectable gentlemen who signed this presentment will not be offended if I say that its value is rather rhetorical than logical. I do not wish to criticise what is evidently more an expression of feeling than anything else. But there are some matters which I cannot help observing in it. There are some things in it which I cannot understand. In the first place, I do not think that the grand jury rightly understood the learned judge, when he told them that their functions prevented Government from putting obnoxious persons on their trial, or rather they imagined him to be giving a more minute exposition of the law than he intended. For, sir, it does happen that the Government already possesses this terrible power of gaining its wicked ends by sending men to be tried at once by the petty jury. Under an English statute,[1] which this Council cannot repeal,[2] the Government has the power of filing, through the Advocate General, what are called informations *ex-officio*, in every case in which it may choose to consider (to use the words of a legal authority) that 'an enormous misdemeanour affecting the commonwealth or public peace' has been committed. Assuming, therefore, that your Excellency's Government were capable of so insane an act, there is nothing to prevent you from putting all the printers of the newspapers in Calcutta on their trial for seditious libel, even though you knew them to be innocent, and the grand jury could not save them. Again, I am unable to reconcile the argument of the grand jury that the greatest of all calamities is to be charged with an offence without reference to

[1] 53 Geo. III., c. 105, s. 103.

[2] This is a slip, and the section referred to has been repealed and re-enacted by Act X. of 1875, secs. 2, 144, 146.

ultimate acquittal, and the argument, in which both this and the former jury seemed to coincide, that a large addition should be made to the summary jurisdiction of the magistrates. For if the disgrace consists in the mere accusation without reference to the final establishment of innocence, surely it is as easy to disgrace a man by charging him before a magistrate with a crime which is punishable with hard labour and a flogging, as by charging him with a crime which is punishable with penal servitude or death. Of course it is a matter of taste, but if I were in the predicament of having a false charge brought against me by men in power, though I knew I should be acquitted of it, and had my choice of the accusation, I confess I should prefer treason to larceny. But the question which I should really like to ask these gentlemen who signed the presentment—some of them well-known members of the mercantile community of Calcutta—is whether they are not satisfied to dispense with the inquiry before the grand jury in cases in which they are greatly more interested than in criminal charges? If a merchant of Calcutta were in danger of being involved by a malignant enemy in a disagreeable trial, I venture to ask my honourable friends at the other end of the table whether it would be more likely to be a civil or a criminal trial? I fancy I have observed that the number of personal cases—cases in which questions of commercial honour and probity are involved—coming before the civil courts of Calcutta is larger than comes before any jurisdiction of similar extent at home. It seems to me that the risk of being subjected by an unscrupulous private enemy to what I may call a civil charge is, in Calcutta, at least appreciable. In the trial of such a charge a man's good name and mercantile credit, his present fortune, and future prospects may be at stake—in such a case, do you demand a trial by grand jury? No, you do not even ask for a common jury. You are satisfied with the fiat of a single judge, and it seems to me that the verdict of this one man is more respected here than the award of a jury would be at home.

But, sir, of course the only complete answer to the presentment of the Calcutta grand jury will consist in showing what a grand jury is, not only in England, but in India. Everybody, I suppose, is aware that the grand jury was origi-

nally a body which more nearly resembled an assembly of witnesses than what we should now call a jury. It consisted of the principal freeholders of the county, summoned by the sheriff and empowered to declare all matters known to itself and affecting the public comfort or peace. The most characteristic relic of its ancient condition is its power to make presentments of nuisances, in order that they may be abated. Now, considering that Calcutta probably contains more choice samples of every nuisance known to the law than any city inhabited by Europeans, if I had found that the grand jury of Calcutta had exhibited the same activity which I am told the grand jury at Bombay has shown, and had been extraordinarily watchful and vigilant in the presentment of its nuisances, I should have said that, whatever were its anomalies, there was an argument for preserving it. But the Calcutta grand jury has this singularity, that it has grown more inactive in proportion as the city has grown worse. About 1818 it seems to have been in the habit of making presentments on those matters which have lately attracted public attention. But of late years it has made none. I have here an abstract list of presentments—there are a good many about 1857 and 1859—there are some to the effect that the 'arm of justice has been paralysed'— nothing relating to the general health of the city.

I presume, therefore, I can leave out of account the services of the grand jury as a custodian of public health, and pass to its function as a judicial body. What, then, is a grand jury considered from a judicial point of view? Not, I mean, a Calcutta grand jury solely, but a grand jury in England, or in any part of the British dominions. First of all, it is a body of men so numerous, that under almost any conceivable conditions it would be unfitted calmly to sift evidence. For it consists ordinarily of twenty-three persons: and that comes dangerously near the point at which the instincts of a crowd take the place of deliberation.

Then after having so constituted it, you proceed to deprive it of all the aids which modern jurisprudence considers essential to the discovery of truth. You deprive it of the wholesome check of publicity; for since the Star Chamber was

abolished it is the only secret tribunal known to English institutions. Next, you take away the rule of unanimity, which, though no doubt objectionable in its application to small juries, such as those of our Code of Criminal Procedure, is in its application to large juries a valuable curb on the tyranny of the majority. You take away that sustained guidance of the judge without which even real trial by jury—that is, trial by petty jury—would be absurd. You take away all chance of its applying the rules of evidence by the perpetual exemption of practising lawyers; and then, as if you had not done enough for it, you remove the means of cross-examining the witnesses by comparing the statements which they have made at different times, for the grand jury does not see the depositions. And after all is done, you reduce its functions (and in this, perhaps, you act consistently) to a simple guess at a probability, for it only hears one side of the case.

Well, sir, since grand juries are so constituted, and since such are their functions, I have always thought, even in England, that though it includes all the persons in the community who are best able to form a judgment upon evidence, and though in most cases I doubt not that it uses its powers conscientiously, nevertheless its inherent disadvantages are such that a grand jury is an obstruction to justice, and therefore I entirely agree with that metropolitan grand jury which has for a series of years presented itself as a nuisance. But I must admit that in England, although criminal juries are notoriously inferior to civil juries, yet the field from which the two lists of juries are taken is so large that the system is perhaps tolerable. But how does it work in India? Well, if I never left my own house and my own room, I should be able to say how it worked; for it happens that no complaints come so frequently before members of Government as complaints of clerks in our public offices of the extreme frequency with which they are called to serve on petty juries, and of the annoyance to themselves and hindrance to public business caused by the interruption. I mention this because it shows the unfairness with which the burden and heat of assisting in the administration of criminal justice are thrown upon one class under the present system, and also because it illustrates the value of the argument that grand juries should

be retained as a protection against the machinations of a too powerful Government. We are told that grand juries must be preserved, lest we should make tools of the covenanted servants on the bench; and the effect is to send men to be tried for their lives by juries largely composed of the uncovenanted servants in our offices. Of course I know that those gentlemen give honest, independent verdicts. But surely, if your Excellency's Government were capable of the iniquity imputed to it by the Calcutta grand jury, it stands to reason that it had better begin with those officers who, so to speak, are under its eye and under its hand.

My case, however, rests on those opinions of Mr. Ritchie's which have been circulated through the Council. I am myself open to the remark that I have not seen the practical working of the system in India. But here is Mr. Ritchie giving the result of an experience of twenty years. I never saw Mr. Ritchie. But there is such an unanimity of testimony about him, that I cannot doubt that he was a man of remarkable moderation, fairness, and judgment. He was the incontestable leader of the Calcutta Bar, and he wrote these papers while still in a situation—that of Advocate General—which, while it enabled him to see those cases from the point of view of the Government, did not cut him off from sympathy with the opinions of the unofficial community. Here is the net result of his observations. After reciting a list of miscarriages of justice lamentable to read, caused sometimes by the petty jury and sometimes by the grand, but, as he admits, and I readily allow, attributable not to the persons but to the system —in the case of the grand jury to the disadvantages under which it is placed, in the case of the petty jury to the withdrawal from it of those best able to assist it to a conclusion—he deduces from this the inference, which he presses repeatedly on the Government, that grand juries ought to be abolished, and grand and petty jurors fused. I will read the passages of which the words are nearly identical with those of Sir Colley Scotland to the grand jury of Madras.

'The result of a pretty long observation of the practical working of the grand jury in this country is, that the constitution of this tribunal appears to me wholly unadapted to the wants and circum-

stances even of the European portion of the community; that it is unable to afford any safeguard to the innocent, while it often unconsciously serves as an obstruction to the due course of justice; and that the only purpose for which it can now be considered as of any real use—that of imposing some check upon private prosecutions—may be much better attained in a different way.

'I would therefore respectfully urge upon the Government the expediency of taking steps towards the abolition of this body, and the substitution of such proceedings as I have above pointed out. Such substitution is quite within the competency of the Legislative Council, to whose attention, I think, the subject may be submitted with advantage, without waiting to mature more extensive changes in the criminal law procedure applicable to British subjects.

'I am sure that, in the strictures above made, I shall be understood to refer to the defective character of the institution, and not to the class or individuals composing it. For that class and for many of the individual members of it I have a very high respect. And one great improvement in jury trials in this country which I anticipate from the change I advocate, is that those gentlemen will be thereby released from duties which are practically useless, and that their services may be employed in the far more important functions of jurymen at the trial. From an union of the class of grand jurymen with those now called petty jurymen, whereby the high intelligence, position, and independence of the former will be brought to bear upon criminal trials in the Supreme Courts, I think very valuable results may be expected. The actual loss of time to those gentlemen need not probably be greater than it is at present, as the proportion summoned upon each jury need not be large. And it may be reasonably hoped that the time thus taken up, even if longer than at present, will be cheerfully bestowed, as the class from whom it will be required are those most interested in preserving jury trials in this country, and consequently in raising the character of juries. If this change be effected, the service upon juries will be looked on by the public with more respect, and the verdicts of juries will command more general confidence than at present.'

Those, then, are Mr. Ritchie's views. His opinion and his facts coincide so exactly with those which I could have predicted *a priori*, that I have not the slightest doubt of the correctness of either the one or the other.

I have now to address myself to the arguments which I have heard or read for maintaining the grand jury. It is said that the grand jury is a protection to an innocent man falsely accused, especially when he is the victim of unscrupulous en-

mity, whether that of a private adversary, or of men in power, or of the magistrate. I do not deny that the grand jury may sometimes release an innocent man, for if you let a man off it is always possible that he may be innocent. But I say that the case in which it will most rarely occur will be that of an innocent man oppressed by an enemy. To assume that the grand jury can protect you from the false accusation of an enemy, is to assume not only that your enemy is unscrupulous but that he is a fool; for, sir, anybody can get up a colourable *primâ facie* case—at least I hope we may claim that credit for the Government—and before a fair-looking *primâ facie* case, if the grand jurors obey their oaths, the grand jury is helpless. Does it not strike the Council that the most dangerous charges are those which are *primâ facie* impregnable? Suppose that some unlucky combination of events, or, what I am afraid is far from impossible in this country, some artful conspiracy, involved an innocent man in a criminal accusation; surely the chances are that the case on the face of it will be perfect, the witnesses will have concocted their story, and all the documents bear the stamp of authenticity. In such an event, the vindication of innocence will depend exactly on those instrumentalities which the grand jury never has at its command—on the cross-examination of the witnesses, as to facts known only to the accused and therefore unknown to the grand jury; on the strength of the case for the defence, which the grand jury never hears, and on the balancing of fact against fact by the judge whom the grand jury, through the important part of the inquiry, never see. The truth is, that innocent men unjustly accused must place reliance entirely on the petty jury and not on the grand, and the direct effect of the system is to starve and weaken the petty jury. In truth, unless it could be accounted for historically the system would be one of the most unintelligible that ever existed. It is strong at the wrong point and weak at the wrong point; and, if it were worth while reforming it, the only sensible way of doing so would be to turn it upside down, and give the functions of the petty jury to the grand jury, and those of the grand jury to the petty.

I see it further said, that many of the magistrates are in-

competent and prejudiced, and make bad commitments. Now, sir, it is one of the most characteristic results of the grand jury system that it exactly prevents our knowing the facts which are here alleged. Whether the commitments of the magistrates in India are generally bad, or whether any of them are bad, are entirely matters of opinion and conjecture. The cases are disposed of in the darkness of the grand jury room. Of course, the grand jury says that it is right, and occasionally makes emphatic presentments that it is right. But that does not prevent another large class from asserting with equal positiveness that the grand jury was entirely wrong. The public is not let into the secret, and who is to decide? I can only say that my own inquiries have elicited nothing better than positive contradictory assertions. And there is great evil in this. It is the duty of the Local Government to watch for evidence of incompetence or prejudice among the judicial officers, and, if necessary, to rebuke or remove them. Now a trial in the High Court throws such a flood of light on all concerned in it, that it is greatly to be regretted that this system deprives the Local Government of most valuable facilities for forming a judgment on the real standard of capacity among its judicial servants. Here, too, are some remarks of Mr. Ritchie's on another of the fruits of this secrecy:

'Not the least evil attending this state of things is the utter uncertainty as to what has taken place before the grand jury, and the suspicion to which both they and the witnesses are exposed. Whether the witnesses have kept back the truth; whether they have boldly sworn to the contrary of what they deposed to before the magistrate; whether the grand jury have been in a hurry to get away, and have not had the patience thoroughly to investigate the case; whether they have mistaken the nature of their duties, and thought they were bound to ignore a Bill unless they were prepared conclusively to convict; or whether they were carried away by prejudice or sympathies, no human means can detect, and the law does not permit us to inquire. And yet any one of these alternatives may be the true one; and the grand jury and the witnesses are thus placed in the unfair position of being open to a suspicion which may be as unfounded regarding the one as regarding the other, which is of itself disastrous to the administration of justice.'

So far as I myself can form an opinion on a matter about which I confess that all is dark, I am inclined to think that

the presumption is against the grand jury: in fact, the very secrecy itself is a ground for such presumption. The commitments to the High Courts in the presidency towns are practically made either by trained lawyers or by men whose every-day business is to sift evidence. As regards them, I should be disposed to apply the maxim *cuique in arte suâ credendum*; and if the grand jury differs from them, to say that the chances are that the magistrate is right and the grand jury wrong. As to the Mufassal magistrates, I cannot forget that Mr. Justice Peterson, in spring, went even out of his way to compliment the Bengal magistrates on the way they prepared their commitments; and the Chief Justice of Madras, in his charge to the grand jury, declares himself satisfied with the Mufassal commitments in that presidency.

However, sir, to obviate the least chance of injury being done by arraigning a man against whom not even a *primâ facie* case has been established, I am willing to consider in committee a plan which, I have reason to believe, commends itself to several of the judges of the High Court. If the judge, on reading the depositions, thinks that no *primâ facie* case is disclosed, I do not object to giving him power to examine the witnesses in an informal manner, and then, if upon the depositions and the evidence he thinks a conviction impossible, to prevent the accused from being arraigned, and order his discharge. That, after all, is pretty much what he does now; for, though the grand jurors are on oath, I suppose it is no great secret that, in ninety-nine cases out of a hundred, the bills which they ignore are those on which the judge has thrown a doubt in his charge. I do not, however, wish this to be quite a hole-and-corner proceeding; and, therefore, when a judge releases a prisoner, I would place the judge under an obligation to report the case to Government, and state his reasons for the course he has taken.

But, sir, unless arguments are presented to me which have not yet occurred to my mind, further than that I cannot go, speaking for myself as an individual member of the Government. Though this is in itself a little question, a great question is plainly implicated with it. All of us occasionally see complaints from the European community that in public

matters their existence and importance are not sufficiently recognised. But I think the Government may call upon that community to recognise the facts which are implied in its existence. Its existence, its importance, and its growing power are all facts: it is a fact that whole provinces, such as Assam, Cachar, and Sylhet, are getting to belong to it in the same sense that Australia belongs to the Australians. But there are facts on the other side. With this great multiplication of Europeans, there has come, as unfortunately there always does come, a great increase of European crime. How is it to be dealt with? for dealt with it must be, not only in the interests of justice, not only in those of the Native population, not only in those of the European settlers themselves, who, as I said in the statement of objects and reasons, suffer more severely from it than anybody else, but also, I could almost say, in the interests of the criminals themselves. For we all know our countrymen well enough to be aware that, after bearing for a long time with the annoyance caused by unpunished crime, out of respect to some venerable institution, or venerable quirk, they suddenly turn round and call, almost ferociously, for punishment. How, then, is this mass of crime—relatively, if not absolutely, great, and committed over much of India with the most perfect impunity—to be disposed of? For myself, while I think that the Government of India will not have done its duty until every European criminal is brought to justice as certainly as if he were a Native, I am opposed (to use a phrase which I dislike, and which I think reflects no credit on those who invented it) to a Black Act. I think that, for so long a time as we can look forward to, European British subjects will have to be tried for all serious crimes by special tribunals—that is, by a judge applying those strict criteria of truth which constitute the English law of evidence, and a jury—a real jury—a petty jury. To put that on its lowest ground, it seems to me that trial by jury—that is, trial by the petty jury—has affected English character more than any national institution—even more, I am inclined to say, than representative institutions. While, then, we preserve and protect so many Native customs that we cannot even justify, I regard it as only reasonable to respect the greatest and most influential of Eng-

lish usages. The exemption, therefore, of British subjects from the ordinary criminal tribunals seems to me to stand on precisely the same ground as the exemption of Hindús and Muhammadans from the new civil code which is about to be introduced. But of course I have more positive grounds for my opinion. I consider that these special courts, scattered or moving about the country, will be of the utmost importance as examples and patterns. They will exhibit the English law where it is strongest, and serve to correct the Mufassal courts where they are said to be weakest, namely, in the sifting of evidence and the ascertaining of facts. But if Europeans are to enjoy this privilege (I don't use the word in an invidious sense), they must expect to enjoy it in a reasonable way ; and I think that the first and best evidence of reasonableness will consist in their consenting to give up the grand jury. For my own part, believing as I do that the greatest contribution of English lawyers to the art of practical justice—perhaps their only very great contribution—is the discovery of the process of ascertaining facts by judge and jury through the agency of the rules of evidence, and believing that the spectacle of the process in operation will be of the utmost value in India, it is matter of every-day regret to me that its impressiveness and authority should be spoiled by this absurd appendage of an institution which, in all but the integrity of those who take part in it, exhibits the worst characteristics of Oriental procedure—which is secret and one-sided, and unscientific and irresponsible, and which, besides, sucks all the life-blood out of the invaluable institution on which it hangs.

I have only one thing more to say. I have no right to assume that any part of the feeling against this Bill has been caused by the belief that I wished for a simple fusion of the grand and petty jury lists. The formation of those lists is a matter which I thought it would be more respectful to leave to the High Courts, as they now possess it by Act of Parliament. But I wish to say that, in my opinion, there should be no such fusion ; and I have no objection expressly to introduce into the Bill a power to that effect. I believe it is practically found that men deliberate better together when they belong to the same average station in life. I would therefore follow

the practice adopted with respect to civil juries at home, and have both a special and a common jury list for criminal cases. The special list would contain the majority of the present grand jurors, and juries would be taken from it in all cases of great importance, or which the High Court should deem to be of peculiar difficulty.[1] The grand jurors will then do little more work than they do at present, and do it much more effectually. And if it should enter into your Excellency's head, or rather that of my honourable friend the Lieutenant Governor—for I believe that it is he who here represents an aggressive despotism—to put on his trial an innocent man who is a public or private adversary, I venture to think that, if the trial is held by a judge of the High Court and a jury from this list, my honourable friend will be extremely disappointed.

THE LAW OF SUCCESSION

NOVEMBER 25, 1864; MARCH 3, 1865.

IN December, 1861, Her Majesty appointed a commission composed of Sir John Romilly (the then Master of the Rolls), Chief Justice Erle, Sir E. Ryan, Mr. Lowe (late Lord Sherbrooke), Mr. Justice Willes, and Mr. J. M. Macleod, one of Macaulay's fellow-workers, to frame for India 'a body of substantive law, in preparing which the law of England should be used as a basis.' The first of the drafts framed by the commission was a Bill to define and amend the law of intestate and testamentary succession in British India, which became law as Act X. of 1865. But it departed widely and happily from the law of England by abolishing the distinction between the devolution of movable and that of immovable property, and by declaring that no person should acquire by marriage any interest in the property of the person whom he or she marries. Mr. Maine introduced the Bill, and moved that it be referred to a select committee.

He said that though it was difficult to overrate the importance of the measure, he proposed to introduce it with very few observations. Probably the Council would think it due to the eminent names appended to the report to refer the Bill at once to the committee. Moreover, he thought that he could not usefully add anything to the analysis of their work

[1] This is now the law under the Criminal Procedure Code, Act X. of 1882, secs. 276, 312–315.

which the Commissioners themselves had furnished, and in his statement of objects and reasons he had said everything which he had to state as to the probable effect of this code on certain races and classes. He only wished to suggest for the consideration of the Council the course which it seemed to him most expedient to follow. The Council might have observed that in his statement of objects and reasons he had expressed himself doubtfully as to the applicability of the code to certain wild tribes who did not fall within the exception of Hindús and Muhammadans—such, for example, as the Bhíls, the Khonds, and the Kóls, whose gradual civilisation had lately been attracting notice both at home and in India, the Buddhist tribes spread along the crest of the Himálaya, such as the Tibetans in the valley of Spíti and the Lepchas about Darjíling. He believed it was found that in proportion to the barbarism of a tribe was the faintness of the notion of individual right as distinguished from family right. Thus, while the rights of one household against another might be clearly ascertained, the rights of the members of each household *inter se* would probably be faintly and vaguely defined. When, then, all that you knew of a particular race was that it was barbarous, the presumption was, as he had said in the statement of objects and reasons, that a system of conjoint family-enjoyment during life was combined with a system of conjoint family-succession after death. It was accordingly difficult to say what might be the effect produced by a law of succession like that of the code on a set of barbarous customs. A violent disturbance of them might be effected by the very sharpness and precision with which the rights were declared. Being aware of this danger, the Government requested the officers in charge of these tribes carefully to consider the effect which the first chapter of the code would have on their customary law. Little information of the kind had, however, come in, and that was not surprising. For it was by no means easy to ascertain the detail of a body of barbarian custom; when ascertained it was harder still to state it in intelligible language; and more difficult still to define what would be the effect upon it of a civilised body of law. Mr. Maine was afraid that if they waited for all the

information they required, the enactment of that part of the code would be inordinately delayed. He therefore proposed that if the Council was satisfied of the wholesome operation of the new law upon the more civilised races to whom, as it stood, it applied, it should be enacted with a section empowering the Governor General in Council to exempt from its operation any race, sect, or tribe; and moreover, to exempt them retrospectively from the moment of the passing of the Bill, so that there might be no inconvenient interruption in the devolution of rights.[1] He trusted that under this power it would not be necessary to exempt a race so numerous as the Burmese. Turning to the more civilised races, the first place among them was of course taken by the Europeans. He was happy to say that all the information he had received led him to believe that this part of the code would be received by them with favour. Outside the presidency towns, it would be heartily welcomed; and, indeed, no one could contemplate the utter doubtfulness and uncertainty of the European law of property in the Mufassal without feeling that a much worse set of provisions than this would be the greatest of boons.

He would advert to one or two criticisms—he could hardly call them objections—which had reached him as to this chapter of the code considered as a modification of English law. He had received a printed paper which had possibly been sent to other members of Council. The writer professed to be a Scotchman, and to speak the feelings of a number of Scotch gentlemen who were settled in India. He was warmly in favour of this part of the code, and wished that it should become law with the least possible delay, but expressed a fear that it might compromise a principle which he and his countrymen prized on moral and social grounds; the principle of legitimation *per subsequens matrimonium*—that is, the principle by which under Scottish law natural children were legitimated by the after-marriage of their parents. The objection, Mr. Maine thought, was founded on a misconception. It was true that the code declared that none but legitimate children should succeed; but it nowhere as

[1] See, accordingly, Act X. of 1865, sec. 332.

yet defined legitimacy. Whatever, therefore, were at the present moment the law of India determining the legitimacy of a Scotchman's children, a question upon which Mr. Maine would be sorry to offer a very positive opinion, it would be wholly unaffected by the enactment of this part of the code. Doubtless the question—and it was a most difficult one—would have to be decided hereafter whenever the chapter on the law of persons came before them for consideration. But it was probable that that chapter would be the last taken up by the English Law Commissioners.

Another remark had been addressed to Mr. Maine on Section 4, which declared that 'no person shall by marriage acquire any interest in the property of the person whom he or she marries, nor become incapable of doing any act in respect of his or her own property, which he or she could have done if unmarried.' A doubt had been hinted whether, on moral grounds, the complete proprietary independence of husband and wife was justifiable. But in this section marriage meant the mere fact of marriage, and the provisions of any will or marriage settlement were unaffected by it. It was true that in England, under the common law, the fact of marriage conferred on a husband certain rights over his wife's realty, and the whole of her personalty, past and present. But the operation of the rule was much controlled by certain doctrines of the Court of Chancery, compelling a husband to settle property devolving on his wife, when it happened to be only recoverable through the agency of the Court; and, as regards the property-holding classes, the practical effect of marriage settlements and wills was to render the rule of very limited application. Mr. Maine imagined that an English father would consider it a great calamity that his daughter should marry without a settlement. Either, therefore, that settlement or some will controlled the enjoyment of the property, and it was only through accident that the naked rule of law was allowed to operate.

Similar considerations carried with them the answer to another criticism which had reached him. This law of succession practically turned realty into personalty, and provided that the same rules of succession should govern both. He

had been asked whether the extreme subdivision of land which a similar law of succession was supposed to draw with it in France, was, on economical grounds, desirable, either for India or for any other country. Here also was apparently a misconception arising from not taking into account marriage settlements and wills. The reason why the *morcellement*, as it was called, of land in France had gone so far was, not because the French law of intestate succession divided the land equally among all the children, but because the French code contained a number of most stringent prohibitions against private interference with that law. It might be said that the French code compelled a man to die intestate, since, if he left children, any will which he might make could have only the most limited operation. It was, indeed, notorious that if those restrictions had not existed, a very large part of the soil of France, on the return of the French nobility in 1814 and 1815, would have been tied up in entails nearly as strict as those which existed previous to the Revolution, even though the law of succession to an intestate was precisely the same as that of the proposed Indian code. It was further a fact that in some European countries, into which the French code had been introduced but in which these prohibitions had been relaxed in favour of certain classes, the existing settlements and entails were even more stringent than those usually found in England, there often not being even a power of portioning daughters. The truth was that, when you were dealing with educated and property-holding societies, the question of the legal consequences which were to follow from the mere facts of marriage and of death had chiefly a technical importance; and he had no doubt that technical considerations had mainly influenced the Commissioners in framing these provisions. It was quite certain that, when you had once enacted that marriage should not *per se* confer any rights on husband or wife, and that the law of succession to land should be the same as the law of succession to personalty, you at one stroke introduced an amount of simplicity into English law which was almost incredible.

The only serious difficulty which would have to be

encountered in committee arose through the proposed application of the code to the Párs'is. The Council might be aware that the Párs'is had under distinguished legal advice prepared a partial code of civil law, including chapters on marriage, divorce, and succession.[1] Mr. Maine, in his statement of objects and reasons, had proposed that the Párs'i code should be considered *pari passu* with the draft of the English Law Commissioners, who were themselves of opinion that the law which they had framed should suffice for the Párs'is. But the heads of the Párs'i community objected to that course, on the ground that no one could say how long it would be before the Indian civil code became the law of India. Mr. Maine fully admitted the force of that objection as regarded the chapters on marriage and divorce. He was therefore quite willing that the chapters of the Párs'i code on those subjects should become law whenever his honourable friend, Mr. Anderson, introduced them. But he, Mr. Maine, still proposed to consider the Commissioners' draft of the succession law together with that of the Párs'is. He, in fact, hoped that the first chapter of the Indian civil code would be passed before the Council separated in the spring, and therefore the objection of the Párs'is as to time would be met. If the Párs'is turned out to have an invincible repugnance to certain provisions of the code, special legislation on their behalf might be carried through before the sittings were ended. Mr. Maine was not unaware of the nature of certain specific objections of the Párs'i community to particular rules laid down by the Law Commissioners, and as to some of them, he had a pretty strong opinion of his own. He hoped, however, that he was not so pedantic as to press an abstract opinion against an ancient and venerated usage when no great practical evil resulted from it.

Mr. Maine then proceeded as follows:—One thing more I have to say. I venture to predict that when the first chapter of the civil code has been examined and discussed by the Council and its committee, the strongest impression left on their mind will be respect for the Commissioners who prepared it. I know, of course, that they had the assistance of

[1] These chapters were enacted as Act XV. of 1865, and Act XXI. of 1865.

able subordinates. But still, after making every allowance for that advantage, it remains wonderful that these Commissioners, overtasked judges, hardworked practising barristers, gentlemen immersed in politics or in the duties of office, should have found time to superintend and control the preparation of a body of law, in which not only has each separate proposition been carefully considered and measured both as to form and substance, but the bearing of each and every proposition on the residue has been forecasted and ascertained. Perhaps, however, now that I perceive what the true objects of the Commissioners have been, my surprise is less than that of others ; for I have seen enough personally of the real luminaries of English law to know the falsity of the ignorant delusion that there is something in great technical knowledge and great practical aptitude which implies a contempt for theoretical perfection. My own experience—it is necessarily limited, but still I state a fact—is that, in proportion to the judicial or professional eminence of an English lawyer is his sensitiveness to the undoubted faults of English law, and his anxious desire that, to that strong and solid structure of common sense which constitutes its mass, there should be added excellences to which it certainly cannot at present lay claim—simplicity, symmetry, intelligibility, and logical coherence. Knowing this, I scarcely marvel that these gentlemen should have devoted much of a leisure which they can ill spare to the preparation of a code which, to judge from this first instalment, while it preserves all that is best worth keeping and of most general application in English law, combines it with a simplicity of form and an intelligibility of statement which a French codifier might envy. And their reward, and that of all who have taken part in these Indian codes will be—I may say that without presumption, as I have no share in the earlier codes, and expect to have little more than a mechanical part in this—that their labours are probably destined to exercise hardly less influence over the countless communities obeying English law than the French codes have exercised, and still exercise, over the greater part of the continent of Europe.

On March 3, 1865, Mr. Maine moved that the report of the select committee be taken into consideration, and, after describing certain changes made in the Bill, proceeded as follows :

Sir, though we thus propose to contract greatly the primary sphere of the operation of this new law, I do not feel inclined to modify the language which I employed when I introduced the Bill to the Council, as to its great importance to India. To the European community it will prove, I believe, an unmixed advantage, and will even deliver them from dangers which perhaps they do not quite appreciate, but which I regard as imminent and serious. But I must describe it as scarcely less of a boon to the rest of the people of India. Sir, insensibly and gradually, large sections of the Hindú and other communities have acquired the power of testamentary disposition, which probably, and indeed certainly, was not enjoyed by them under their ancient usages. Now, there is no stronger stimulant to civilisation than the liberty of testation ; but I am afraid that there is a heavy set-off against its advantage in India through the encouragement afforded to fraud. Your Excellency in Council, if this Bill becomes law, will probably think fit to inquire of those who are most competent to speak with authority, whether the provisions of this code relating to testamentary disposition might not safely be extended to all the races of India who have the power of making wills.[1] I must further bring to the notice of the Council that this Bill contains a part of a vast mass of law, which is accepted as law by all the civilised races of the West, independently of express enactment. The rules I refer to are deemed to embody first principles, or direct deductions from first principles. Whatever be their true origin—and the better opinion is that most of them descend from the Roman civil law—they have long commended themselves to the common sense of all European communities. Even in England, this body of rules has never been put into so intelligible

[1] The Hindú Wills Act (XXI. of 1870) applies to the wills of Hindús, Jainas, Sikhs, and Buddhists the rules of the Indian Succession Act relating to execution, attestation, revocation, revival, interpretation, and probate. But it does not apply to Muhammadans, and it extends only to the Lower Provinces of Bengal and the towns of Madras and Bombay. The Probate and Administration Act, V. of 1881, applies to all Natives most of the rules as to probate and letters of administration.

and accessible a shape as it is placed by this law. English practitioners have to gather it painfully from dispersed treatises and detached law-reports. Even if this part of our code were nothing more than a repertory of these rules, it would be difficult to overrate its value, for the want of such a repertory is greatly felt in our Mufassal courts, and I have no doubt that the definite rules contained in it will rapidly fill the void which is now somewhat vaguely occupied by inferences from the not very certain canon of 'equity and good conscience.'[1] But beyond all doubt, the great influence of this code will be its influence as a model and a type. Judging by experience, there are no limits to the influence which a clear and simple body of written law exercises in absorbing less advanced systems of jurisprudence. The great example of this is of course the French codes, which, violently detested and vehemently decried after the collapse of the French Empire in 1815, give now in 1865 the law to all but a fragment of continental Europe. Through the effects of this power of absorption, I have no doubt that, if our Bill become law, it will ultimately deserve the title which at present we hesitate to give it—that, namely, of 'The Indian Civil Code.'

Next to the abolition of the distinction between the devolution of movable and that of immovable property, the most important changes in the law proposed by the Bill were contained in the following sections:

43. 'No person shall, by marriage, acquire any interest in the property of the person whom he or she marries, nor become incapable of doing any act in respect of his or her own property, which he or she could have done if unmarried.'

44. 'If a person whose domicile is not in British India marries in British India a person whose domicile is in British India, neither party acquires by the marriage any rights in respect of any property of the other party not comprised in a settlement made previous to the marriage, which he or she would not acquire thereby if both were domiciled in British India at the time of the marriage.'

[1] 'Practically speaking,' once said Sir James Stephen, 'these attractive words mean little more than an imperfect understanding of imperfect collections of not very recent editions of English text-books.'

Mr. (now Sir William) Muir having moved, in a long and able speech, that these sections be omitted, Mr. Maine spoke as follows :

The first observation which my honourable friend's speech calls for is a reply to his remark that this section has not been discussed by the Indian press. It so happens that it is the only section which has been discussed. We sometimes suffer from the want of discussion on the part of the press ; but the observations on this provision which I made when I introduced the Bill were really elicited by comments on it in an Indian newspaper for whose readers I intended the explanations which I then offered, and which I am about to repeat.

I submit to my honourable friend that it will be impossible to carry his amendment without going further. I do not wish to obstruct any course he may think fit to take. But I must say that if these sections are simply omitted, the result will be almost inextricable confusion. As he himself appears to anticipate, the English law of marriage in its application to property will survive, since we have practically confined the operation of the code to the European community. Now, as I before explained, one of the principal objects of the new law is to efface the distinction between real and personal property, to substitute that between movables and immovables, and to provide simple rules of testamentary disposition and of intestate succession uniform for property of either kind. But the English law of property as affected by marriage, has essentially for its basis the distinction between realty and personalty. It has been correctly described by my honourable friend. It gives the husband all his wife's personalty, it confers on him certain limited rights over her realty, over debts due to her and over what are called her chattels real. On the other hand, the wife acquires a right to dower out of her husband's lands. I speak of course of the law of marriage as unaffected by marriage settlement, or by the provisions of any will of the person from whom the property has devo ved. What, then, will be the effect ? Wills and marriage settlements are *in pari materia.* Succession after death is just as often determined by one as by the other. Every will, therefore, made under this code will be governed by one set of prin-

ciples; every marriage settlement will be made under another. There will be entanglement between the two, and so far from having increased the simplicity of the law, we shall have added greatly to its complexity. If the amendment is carried, the first form of the last section must be restored, and the code will only come into operation after the chapter on the law of Persons shall have been passed. But as the Commissioners will almost certainly take that up last in order, the code, when it is enacted, will have ceased to have practical interest for anybody now in India.

I have no doubt, however, that my honourable friend has proposed his amendments with a view of raising the question of principle which he has very ably argued. He has stated, though with more moderation, the views expressed by Mr. Justice Seton-Karr in a minute on this section, which he has forwarded to the Council. To put these objections in a clear light, I will cite a part of Mr. Seton-Karr's animadversions:

'It involves a fundamental change in the conditions of married existence, which seems to me wholly uncalled for; likely to create feuds or to increase them; at variance with a principle well known, popularly accepted, and long established in England; subversive of the harmony and well-being of the closest social intercourse; opposed to the wholesome relation in which the woman stands to the man; destructive of mutual dependence and honour, and a mere concession to the levelling spirit of the present age, presented under the guise of a questionable liberality.'

Sir, I trust I shall not occupy much of the Council's time in showing that the Indian Law Commissioners are not open to these grave charges. Whether I shall present the justification which the Commissioners themselves would give I really cannot say. For I suppose that the last criticism on their code they would expect would be this. How little these gentlemen, who are not more learned than respectable, can be prepared for the charge that they are intending disturbers of domestic peace, may be inferred from the fact to which my honourable friend has adverted, but without bringing out its full significance, that this section simply embodies the provisions which are inserted as a matter of course into every well-drawn English settlement when the property of the lady is brought under it. I venture to say that every lawyer

practised in conveyancing—our friend the Secretary to the Council for example—would insert it without a second thought if he had no express instructions to the contrary, or rather he would prescribe a more stringent rule, as my honourable friend seems himself to be aware, though I do not comprehend the argumentative use to which he has put his knowledge of the fact. There is a certain magical formula of English law —'to her sole and separate use'—which, wherever it is found, has the exact effect of this section. But it is usual to take a further step to which, as it seems, my honourable friend must object, *à fortiori*, and to deprive the wife of the power of anticipation, so that not only has she the control of her property, but is unable to divest herself of it in favour of her husband or of anybody else. The Law Commissioners therefore appear to me to have followed what is the soundest of all rules in amending legislation. They find the nominal law one way, the actual practice another. They know by experience that the nominal law is altogether overridden by inveterate usage. Thereupon they have taken the usage and made it into the law. Sir, it seems to me that the argument of my honourable friend and of these learned judges, Mr. Justice Seton-Karr and Mr. Justice Campbell,[1] lead inevitably to the conclusion, which surely, with all respect, I may venture to call absurd, that in every household in England afflicted with the calamity of a fortune devolving on a wife from her parents, dissension and suspicion must reign, and a generally immoral state of relations be established. Mr. Justice Campbell observes that he has become alive to the mischievousness of this section from sad experience of the evil effects of a similar rule among the ladies in the zenánás of the Shía Muhammadans in Oudh. I venture to think that the experience of English gentlewomen is more germane to the purpose, and I say that the averment that to give them a share in the control of the property they have inherited impairs their sense of conjugal duty is calumnious. I do not, indeed, mean to say that it is calumnious in the mouth of my honourable friend or of these learned judges. I attribute a feeling, which to me is perfectly unintelligible, to a small

[1] The late Sir Geo. Campbell.

circumstance peculiar to India, which is not unimportant. Members of the Services in India marry generally under the provisions of their funds, which, in fact, are ready-made marriage settlements. As, then, these funds are formed by retrenchments from the earnings of the husband, a marriage settlement in India is most frequently a provision made exclusively by the husband. But a marriage settlement in England is just as often a settlement of the wife's fortune; and I say that the general sense of equity and fairness prevailing among Englishmen would be severely shocked if there were not reserved to the wife a control over her property, or, at all events, the free exercise of her volition in giving it away. And so strong is this feeling that the property-holding classes have given the benefit of their own practice to the poor, and some recent enactments have been passed to protect the personal earnings of a wife against the common-law rights of her husband.

Sir, the first reason which I should expect the Commissioners to give in justification of this section is this—that by it in an eminent degree they have attained to simplicity. It is no doubt possible for the lawgiver to regulate by express legislation the law of property as affected by the status of marriage—to select some system of proprietary relations between husband and wife as in itself the best and most expedient—and yet to construct a tolerably simple body of jurisprudence. But such simplicity can be secured on one condition, which is quite indispensable. It is this—that after choosing your ideally perfect set of relations, you adhere to it, and abide by it—that by express prohibitions you forbid any but the most inconsiderable departure from it. It is, as it seems to me, an inadequate appreciation of this truth which deprives of value my honourable friend's citations from foreign bodies of law. The French codes, which are doubtless the most liberal of all, and which are destined to absorb almost all the others, provide, as my honourable friend has correctly stated, three alternative forms of marriage settlement, and ordain that if none in particular be adopted by the persons marrying, one special settlement shall prevail. But, then, under French law, no marriage settlement is allowed to affect

succession after death. Every contract of the kind is subject to the inflexible rules which compel the absolutely equal division of the property among the children. Moreover, the enjoyment of the property by the married persons during their joint lives can only be varied from the provisions of these three ready-made settlements in a very slight degree. Some deviation through what are called 'auxiliary pacts' —'collateral articles' as we probably should call them—is permitted, but such deviation is not considerable. Speaking roughly, it may be said that two persons intending to marry under French law are confined to a choice among three forms of marriage settlement, and can only affect their own life-interests.

Compared, then, with the almost unlimited liberty of making settlements which is permitted by English law, the French system is one of the severest restriction. I suppose, then, the Law Commissioners to have reasoned in this way: 'We offer no opinion as to the abstract expediency of the proprietary independence of husband and wife. We are ready to admit that, in particular cases, it may be desirable to give the husband a larger control over his wife's fortune. But we are unable to reconcile any legislation founded on this admission with that unbounded liberty of moulding settlements to the position of the persons and of the property which the English law has long permitted, which the English people have long practised, and which we intend to confer on the people of India. Granting the unshackled freedom of making settlements, we think that the proprietary independence of man and wife is the best point to start from. For it is found by the experience, the consentaneous experience of English lawyers, that if you insert a series of provisions in a law, but permit them to be overruled at the pleasure or caprice of individuals, you make an absolute sacrifice of simplicity. For the immediate result is this—every line and perhaps every word of every marriage settlement will have to be framed with an express or tacit reference to the antecedent provisions of the code. The object is to exclude those antecedent provisions and to substitute others. But this can only be done by a person who has those provisions in his

mind and their legal consequences also. The effect will therefore be to defeat one of the principal objects of this legislation, which is to dispense with the absolute necessity of employing professional lawyers in drawing wills and marriage settlements. Probably under no system of law will it ever be quite safe to dispense with professional assistance. But if this code be not tampered with, it will ensure, as far as is possible, that the intentions of a testator or settlor expressed in plain and untechnical language shall have effect.' The Commissioners, therefore, secure by this section the great legal advantage of simplicity. But let me ask, on their behalf, do they sacrifice morality? Really, sir, the feeling of my honourable friend, and of the two learned judges, appears to me utterly inexplicable. They seem to regard it as almost sinful in the law-giver to decline to express a preference for one particular system of proprietary relations between husband and wife, and Mr. Justice Campbell claims the most solemn sanctions for some arrangement which is not clearly explained, but which, at all events, is not that of the code. But neither my honourable friend nor Mr. Campbell seem to have the smallest objection to allowing their typical system to be overridden by the first comer. If, then, the system of the Law Commissioners be sinful, I say that the system of my honourable friend and Mr. Campbell is sacrilegious. If a particular state of the law of property is sanctified at the altar, to allow it to be set aside is to profane the altar. Sir, the English Marriage Service still contains the ancient formula by which the Church in the Dark Ages constrained the husband to promise that he would give his wife after his death her dower and thirds, a promise which has given its form to the common law of nearly all Europe. It usually happens that the marriage settlement, signed a day or two before the ceremony, makes the wife covenant to renounce her dower and thirds. Now, if the meaning of the promise were generally understood, which it certainly is not, does my honourable friend think that it adds solemnity to the occasion, or that it might not be omitted with advantage? I think that there is something like indecency even in a secular legislature to set up provisions which will certainly be knocked down by everybody like men of straw.

But if these provisions have the sanctity which is now claimed for them, there is something worse than indecency.

Another justification which perhaps the Commissioners would offer is that the section, except in very rare cases, will only have effect when it has been deliberately intended that it should have effect. I asserted once before that there is no practice which diffuses itself so rapidly as the practice of making wills and marriage settlements, and under the simple forms permitted by this code the chances are that it extends itself more widely in India than in England. But if by some accident—and it will only occur through an accident—property should devolve from her relatives on a wife during marriage in such a way that this section operates upon it, I cannot for a moment admit that there is the smallest objection to requiring the wife's consent before this property is dealt with by her husband. The learned judges do not seem to me fully to comprehend what my honourable friend has shown that he understands, though it does not help his argument, that this section does not forbid the wife to divest herself of that control over her property which it secures to her. There will be nothing to prevent her re-settling it the next moment to her husband's advantage. There have been systems of jurisprudence which, like the Roman law, made it their deliberate policy to keep apart the property of husband and wife. But then the Roman law went on by its prohibition of donations *inter virum et uxorem* to forbid one married partner to alienate his or her property in favour of the other.[1] An English marriage settlement when strictly drawn has the same effect as regards gifts from the wife to the husband. But this section puts no obstacle in the way of an immediate re-settlement. What conceivable objection can there be to requiring the wife's consent to it? If that state of relations follow which in the great majority of cases does follow, it would certainly be asked, and that household must be miserably ordered in which the intelligent assent of the wife to an advantageous disposition of the property is not asked, and given as a matter of course. But assume the contrary—assume that the wife capriciously and maliciously, and to the detriment of the common interest,

[1] See the Code of Justinian, 5. 16. 4, and the Vatican Fragments, 269.

refuses her consent. Does my honourable friend, who has the peace of families at heart, suppose that he would mend matters by allowing the husband violently to take away that which he has not earned or given? Since the beginning of the world, or at all events since the War of Troy, no great amount of good feeling, so far as I know, was ever created by allowing one person to take away by force what belongs to another. Nothing can be clearer, in short, than the probable operation of the section. In the great majority of cases the law will correspond with that which, apart from law, would exist in fact. In the few exceptional instances, no good would be done by attempting legislation.

But, sir, for myself I must admit in all honesty that, according to my individual judgment, it would be better if it were even commoner than it is to give the wife a control over her own property, and if that control were more sustained and continued. I wonder that my honourable friend has not learned the same lesson which I have learned from our discussions on this code. Why is it that after exempting Hindús and Muhammadans from its operation we have been led successively to except nearly every Native race in India? The reason is the same throughout—the insurmountable distaste which all feel for anything like an equality of privileges between the sexes. Some will allow the woman to have nothing: they say that she should be supported by her parents when she is unmarried; that her husband should maintain her when she is married; and that after his death, since the British Government permits her to live, she should be at the charge of her children or relatives. Others go a step further, and admit that the woman has a right to a share of the patrimonial property. But they affirm that it is an indeterminate share, determinable by her needs or by the sense of equity prevailing in the family. If I had no data to go upon other than those which these discussions supplied, I should be led to the conclusion which I have arrived at independently, that if there exists any test of the degree in which a society approximates to that condition which we call civilisation, it is the degree in which it approaches the admission of an equality of right between the sexes. In this country I am sure that by simply applying that criterion you could construct a scale of barbarism and

civilisation which would commend itself to every man's perceptions. My honourable friend Mr. Anderson must forgive me for saying, that perhaps the last struggle of barbarism—I do not use the word offensively, but as a term of degree—occurs in the case of his excellent clients the Pársís, who are ahead of the other races in allowing to women a definite share of property and in permitting them to enjoy it independently, but who seem to consider it a sin against nature if daughters were to take more than a fourth as much as their brothers. I once had a conversation with a very able Native member of Council on some project of law, and I observed to him that if his view were correct, there would be no difference between wifehood and slavery. 'Well,' said he, 'but that is the very doctrine from which we take our start.' Now, of course the views of my honourable friend and the two learned judges are very remote from this—they are very near the other end of the scale. But the question is, whether they are wholly unallied with it? I have always observed that prejudice, when driven to its last stronghold, generally clothes itself in language of a certain vague magnificence; and I cannot help suspecting that something of the doctrine of my Native friend lurks in the generalities of my honourable friend and the learned judges about the ideal type of the family.

Sir, I think we may claim, not for English law, but for English lawyers, the discovery that in order to settle satisfactorily the relations of married life, it is sufficient to rely on the personal obligations of the married couple. You compel them to live together, you settle their rights over their children, you regulate their power of binding one another by contract; their dealings with one another's property you leave them to settle in the way which seems best to them; and if bad is the best, you believe that by minute legislation you cannot make it better.

SMALL CAUSE COURTS

DECEMBER 16, 1864.

THE object of the Bill referred to in the following speech (which became law as Act XI. of 1865) was, first, to consolidate the previous Acts relating to Courts of Small Causes in the Mufassal, and, secondly,

to provide judicial machinery which might dispose of the petty civil litigation of India without compelling the litigant to have recourse to an appeal, but at the same time without depriving him in any considerable degree of the securities for justice which are at present afforded by the appeal system. It also created the offices of Registrar and Judge Extraordinary.

In introducing the Bill and moving that it be referred to a select committee Mr. Maine spoke as follows :

This Bill, on its first appearance, attracted some interest and excited much discussion. I do not think that, in its present form, objection will be taken either to its principle or to its details. The controverted parts of the Bill were the sections relating to specific performance, which I have now agreed to remove to the code of my honourable friend Mr. Harington, where no doubt their proper place is. Apart from those sections, nobody will doubt that the measure will contribute to the efficiency of the Small Cause Courts, and possibly to their extension. It will effect some mechanical improvements—considerable, no doubt, but still, in their nature, chiefly mechanical—in the organisation of those courts, which I consider one of the greatest of the benefits which the country owes to my honourable friend Mr. Harington. In one sense, indeed, the Bill cannot fail. For it only empowers the Local Government, with the concurrence of the Governor General in Council, to introduce the system which it creates into particular districts ; and if experience and observation show that the existing arrangements possess any superiority, it will always be possible to re-establish them.

If one watches the practical working of Small Cause Courts —and no one has observed them with greater attention or interest than I have—one cannot help being struck that the principal drawback on the efficiency of the system, in Bengal at all events, is connected with these courts being isolated tribunals. Whether or not that was intended by Mr. Harington, I do not know. But it is the fact that Small Cause Courts in the Mufassal are mainly isolated tribunals, presided over by a single judge. The result is that, if a neighbourhood be thickly populated, and litigation be consequently active, the Government can afford to establish a

court with a judge of capacity, and to allot to him an adequate salary. If, however, the population be sparse, and there be, therefore, little litigation, then, as a Small Cause Court is an expensive court to the extent to which its cost is not covered by its stamps, the Government cannot take upon itself the charge involved in the establishment of a court of the first class. It is, therefore, driven to the alternative of either appointing an inferior judge on a lower salary, or of joining other judicial functions to those of the Small Cause Court. Both those expedients seem to me violations of the principle on which Small Cause Courts are founded. Presently I will say what that principle appears to be. It is enough now to state that the obvious remedy is to link courts of the lower class together in groups, so that the suitors may have the advantage at all events of occasional and periodical visits by judges of capacity. The Bill therefore provides for a judge of the first class going circuit among these courts, under rules to be laid down by the Local Government. Certainly, if we stopped there, I am not sure that the system would not break down; for in every court there is a great mass of routine business to be done, and a good deal of business which I should call 'semi-judicial.' By this last name I should distinguish such duties as examining the plaint, or passing decrees in unopposed suits; and I should call 'routine business' that which is described in sections 32 and 34 of the Bill. Such business imposes at present a heavy burthen on judges, and it would become more onerous if judges only paid periodical visits, and stayed but for a limited time. For remedy of this, the Bill adopts an English plan which has been very successful wherever a group of courts subordinate to some great court has been established —as, for example, in the case of the English Courts of Bankruptcy. A special officer is appointed to dispose of the routine and of the semi-judicial business, subject, as to the latter, to the revision of the judge. We call him by the English term registrar. He will not be a mere clerk, but will be strictly subordinate to the judge. In most cases I suppose that he will be a Native gentleman of about the standing of a munsif. I can conceive no better school for

higher judicial employment, and the Bill provides that, when his capacity is assured, he may have jurisdiction conferred upon him up to a certain small amount, stated formally at fifty rupees.

I anticipate no opposition to the commitment of the Bill. But I may take this opportunity of stating my views as to the principles which govern the constitution of Small Cause Courts—principles which seem to me to be greatly misunderstood in India. It appears to be generally believed in this country that a Small Cause Court is created by the simple expedient of cutting off an appeal. I can only explain such an impression by reference to the intolerable practical evils which, before the enactment of the Code of Civil Procedure and other recent laws, were caused by the extravagant facilities which the law furnished for appeals. I have here a well-known book—the work of Mr. Gubbins on the mutinies in Oudh. Into the later editions the author introduced some passages (written, I should say, before the Civil Procedure Code became law, though published afterwards), in which he describes, not the causes of the mutiny (for, like most competent observers, he thinks the ostensible cause to have been the true one), but the grievances which ought to be removed before our administration can be entitled to that character of beneficence which it claims.

'A still greater source of weakness in our civil executive is found in the cumbrous and unsuitable mass of law with which our Indian officers are shackled, and the numberless appeals to which their orders are subjected. Speedy and cheap justice is what is wanted in India ; but any speedy and cheap decision would be better than what we give the people, viz. slow and expensive law.'

What, then, Mr. Gubbins says is simply this: Give us cheap and speedy justice if you can ; if you can't, give us at any rate cheap and speedy decision. Now, sir, although I have been sometimes assumed to have been unreasonably hostile to appeals, I cannot say that I can go so far as that conclusion, to which Mr. Gubbins was conducted by his practical experience of India. If I supposed that an appeal furthered justice, I should no more dream of dispensing with it than I should of deciding a suit by tossing up a rupee—which

is both a cheap and a speedy method of decision. I say that if you organise a Small Cause Court properly, an appeal would not further but obstruct justice. My theory of a Small Cause Court is that, from the limitation of the suits to claims of a certain nature, it is almost exclusively a court for the solution of questions of fact. Hence by considerably—not extraordinarily, but considerably—elevating the capacity of the judge, you are able to utilise to the utmost those inherent and natural advantages which every court of first instance possesses in the decision of facts; that is, you are able to accept its decision in preference to that of any other court which has not actually seen the witnesses and observed their demeanour. I am aware that I here approach the point upon which there is most difference of opinion between English lawyers and the gentlemen belonging to the judicial branch of the Civil Service. I should describe the Indian judicial system, apart from the original jurisdiction of the High Courts, as an exaggeration of that which is established in France. The weakest parts of the system are those at the bottom, the courts of first instance; but their weakness is acquiesced in, because it is believed that a strong Court of Appeal, sitting at a distance, and reading the evidence on paper, can successfully correct their mistakes. Now, in England, in the Courts of Common Law, which are the great courts for the solution of questions of fact, a strong court of first instance—probably the strongest in the world, a judge and jury—is at once placed in contact with the witnesses, and then its decision is accepted as conclusive by all other tribunals. Verdicts are sometimes disturbed. But the court setting them aside does not substitute its own view of the facts; it sends the case back to be tried by another jury. Taking into account the simplicity of the questions, the same principle is applied in the County Courts also. Hence the astonishment—for I can use no other term—of an English lawyer new to India, at the system of regular appeal under which Courts of Appeal freely substitute their own theory of the facts for the view of them taken by the court below, which heard the story of the witnesses from their own lips. I admit that this surprise somewhat diminishes on further acquaintance with the

country; for it is true that, owing to the uniformity of habit and inveteracy of routine among the people of India, it is possible to conjecture what took place in a certain case with a far higher degree of probability than could be attained in the active and diversified societies of Europe. I maintain, however, that the characteristic fault of the Indian judicial system is, that it greatly under-estimates the inherent advantages possessed by courts of first instance, and greatly overrates the power of correction possessed by a Court of Appeal. I will cite two cases which illustrate the difference of theory. The first is rather remarkable for this reason; it was a question of fact tried by the Court of Chancery. Until recently, Courts of Equity in England so far resembled the Indian courts that they relied mainly upon paper evidence, and it was only a certain class of cases which they sent to be tried in the form of an issue by the Courts of Common Law. Recently, however, the belief that no decision on facts is trustworthy which was not arrived at after actual examination of the witnesses has so gained ground that, by late statutes, these courts have been permitted and directed to examine witnesses in open court. The case I quote had, I fear, thus much of resemblance to an Indian case, that the plaintiff and her witnesses all swore to one thing, while the defendant and all his witnesses swore to the exact contrary. Here are a few words from the judge who tried the case, one of the ablest and most patient on the bench, Vice-Chancellor Kindersley:

'In that state of things, there being oath against oath, inasmuch as the onus lay on the plaintiff, who alleged the promise, the decision must be against her, unless there were other circumstances not in dispute sufficient to lead to the conclusion that the defendant was not speaking the truth. His Honour thought there were—first, the letter, and then the interviews with Mr. Starling, and the pause and most expressive silence of the defendant.'

Now, in an Indian regular appeal, I should like to know what became of that pause and expressive silence, which were obviously the most important material for conclusion in the judgment of the Vice-Chancellor. Would they be described on the record, and, if so, what effect would they have on the Sadr Court? Is it not clear that an Indian court would

have followed what, no doubt, is the presumption of law until displaced by contrary evidence? In other words, it would have done injustice and not justice.

My next case is one which I have to ask your Excellency's pardon for mentioning, as your name occurs in it. But it is so instructive that I must quote it in the interest of my argument. I take it from Mr. Gubbins' account.

'I recollect, in 1842, when magistrate of Delhi, that I obtained information of a noted forger, a Mussulman, who resided in the city. He had carried his craft into matters which came before me criminally, and I lost no time in attacking him.

'It was deposed before me that forgery was his business; that he kept a variety of seals of different names, and a large apparatus of all that was necessary to carry on his iniquitous trade, within his house. His arrest and the search of his house were carefully arranged and successfully accomplished.

'The articles seized carried convincing proof of his guilt. He was committed for trial on a charge of fraud and forgery; and John Lawrence (now Sir John) presided as judge. He was convicted; and a sentence of imprisonment for five years was passed. This was justice. But next came law; and, by the aid of the law, the forger came off victorious. He appealed to the Sadr Court of Agra; and, ere long, a warrant, commanding the release of the forger, was received! The Court were not satisfied that the proof was legally sufficient. And the magistrate was cautioned to be careful how he searched the houses of respectable men.'

It is difficult to conceive a more illustrative case. Everything here turned obviously on ocular inspection. It was the eye, and the eye alone, that could decide whether the sinister look of the articles proved them to be the implements of a forger. But the Sadr Court, with the usual Indian confidence in paper descriptions, decided, and most naturally, that the proof was insufficient.

These are extreme cases; but every system must be tested by extreme cases. I do not, however, wish to make any stronger assertion than this—that here we greatly underrate the natural advantages of courts of first instance, and set far too high a value on the corrective power of Courts of Appeal. It is no answer to me to say that our judges of first instance are negligent and incompetent; that, even under the check of appeal, they take down the evidence imperfectly, and that it

would never do to trust them to form irreversible conclusions on questions of fact. All that may, unhappily, be too true; but my doubts attach to the Court of Appeal. I doubt whether, under the existing conditions of the human mind, it is possible successfully to set right, more than to a very limited extent, the mistakes committed in a court of first instance. In reading a great Indian case (we sometimes see them at home in the records of the Privy Council, and I admit that I speak of a time before the worst extravagances of appeal were pruned away), it has often struck me when I have seen the Zila judge starting some ingenious theory over the head of the principal Sadr Amín, and the Sadr Court showing itself still more ingenious than the Zila judge, and the Privy Council (though it did not often sin in that way) perhaps showing itself more ingenious than all—it has often struck me, I say, that the process might after all be like a long mathematical problem, in which, if you make a mistake in the first stage, the error only becomes worse, and vitiates the conclusion more hopelessly, in proportion as the calculation mounts higher up, and becomes more intricate.

But while I lay down theoretically that courts of first instance possess advantages which no Courts of Appeal enjoy, my practical conclusion is a very simple one. It is this: improve your courts of first instance, and, to the extent of your judicial material, establish these Courts of Small Causes. It will be seen why I object to inferior Courts of Small Causes. An inferior court of this kind is not only a waste of public money and an injury to the litigants, but a standing sin against principle. The proper course is to improve your judge till you can save the appeal. Very moderate improvement is, however, sufficient. So great are the natural advantages possessed by courts of first instance, that a moderate elevation of the standard of capacity goes a long way. Fair legal knowledge, honesty, good sense, and familiarity with the language and customs of the people will suffice.

Two points remain to be noted. It may be said to me—granting all you say as to questions of fact, why not give an appeal on points of law? Now, I have no objection on principle to the form of appeal known as special appeal. But the

difficulty is, to whom shall the appeal lie? You cannot send the litigants in these small cases hundreds of miles to the Sadr Court; and if we did give such power of appeal we may be sure that it would be frightfully abused. And then as to the Zila judge. Without meaning the smallest disrespect to the Zila judges, I must say that, if the Small Cause Courts were properly organised (I admit the condition is all-important), there would be no such superiority in the Zila judge as would warrant an appeal of right being given to him from the Small Cause Court judge on the simple points of law which arise, and that rarely, in the Small Cause Courts. The existing system of allowing the judge to state a case for the Sadr Court at his own pleasure seems infinitely the best; and the more you improve the capacity of your judges, the more freely, you may be sure, will they state cases on questions on which there may be genuine cause for doubt.

I must not conclude without making the admission that appeals have one indirect advantage, that they do serve as a mode of supervision. Whether it be true or not that the Court of Appeal can correct the mistakes of the court below, it is an important consideration that the judge below thinks it can; and under this impression a negligent judge may do his work better. I think it very desirable that Small Cause Courts should be under supervision; but far the best mode of supervision appears to me to be the bringing of a second mind to bear on the business of the court. I therefore attach very high importance to the provisions of the Bill for the appointment of judges extraordinary. Under these provisions, the Local Government may invest any judicial officer or person of legal learning with the power of assisting, occasionally or periodically, in the conduct of the jurisdiction of a Small Cause Court. Ordinarily, the person so empowered will doubtless be the Zila judge; but in the vicinity of the presidency towns, I am not without hope that he may be a member of the Presidency Bar, if we can find one who can spare the time, and is reasonably well acquainted with the language. The report of such a judge extraordinary, on the manner in which the business of the court is conducted, will carry with it a supervision not less effective and more consistent with principle than any appeal whatsoever.

PARTNERSHIP 'EN COMMANDITE'

DECEMBER 1, 1865.

THE Bill referred to in the following speech was with one addition and one omission copied from the English statute 27 & 28 Vic. chap. 86, section 1 of which, by simply abolishing an objectionable legal principle, known as the rule in *Waugh* v. *Carver* (2 H. Bl. 235), is expected to produce the same effects as the French system of partnership *en commandite*. That section provides that the loan of money to a trader upon a contract in writing that the lender shall receive a rate of interest varying with the profits, *or shall receive a share of the profits*, shall not, *of itself*, make him a partner.

The remaining sections abolish certain other corollaries from the principle that a person sharing profits shall be liable to third parties as if he were a partner.

Section 2 provides that remuneration of servants or agents by a share of the profits shall not *of itself* render them partners (*Ex parte Digby*, 1 Deac. 341).

Section 3 provides that widows or children of deceased partners, receiving by way of annuity a portion of the profits, shall not, *by reason only of such receipt*, become partners (*Re Kolbeck*, Buck, 48).

Section 4 provides that the receipt of portion of the profits in consideration of the sale of the goodwill of a business shall not, *by reason only of such receipt*, make the seller a partner (*Barry* v. *Nesham*, 3 C. B. 641).

The addition above referred to is that of an explanation to the effect that a retiring partner, leaving in the business the value of his share, shall be construed to make a loan within the meaning of the first section. The omission above referred to is that of the fifth section of the English statute, which provides that, in case of the borrower's insolvency, the commanditarian lender shall not be entitled to prove in competition with the other creditors. This provision would have seriously limited the operation of the enactment; and there would, moreover, have been practical difficulties in working it in the Mufassal, where no system of insolvency had yet been established.[1] The Bill became law as Act XV. of 1866, which was repealed by the Contract Act IX. of 1872, but re-enacted in sections 240–244 of the latter Act.

Mr. Maine, in moving for leave to introduce a Bill to amend the Law of Partnership in India, said that the Bill was, with some alterations necessitated by Indian procedure, transcribed from a statute which passed the

[1] See now the Code of Civil Procedure, secs. 344–360.

British Parliament during the last session. If it became law he hoped it would have the same effects as the French system of partnership *en commandite*. He had called attention at the last sittings to the subject of commanditarian partnership, not because he had a distinct proposal to offer, but because he thought opinion in England ripe for a change in the rule of liability, and because he considered that there were even more reasons for the subject to be discussed in India than called for its discussion at home. If the matter had gone further, and he had proposed that the Council should pass the only Bill which was then before the British Parliament, he should have stated that, however desirable it might be to pass the Bill as a temporary measure, there were some strong objections to it as it was framed. The Bill was well drawn in a technical point of view, but practically it adopted the whole of the French rules on the subject of commanditarian partnership; and many of these rules he considered to be greatly at variance with English commercial habits. In the first place, the necessity of publicly registering advances made upon limited liability was imposed; and although he hoped to be able to show that such advances really tended to strengthen instead of weaken the firm which received them, yet he believed that the effect of registration would be to cast discredit on the firm taking advantage of the new law, and thus the operation of the Act would be greatly narrowed. The Bill, moreover, contained the minute provisions of the French law as to the extent to which the limited partner might interfere with the business. Mr. Maine thought it would practically be found that the persons who would most justifiably engage in commanditarian transactions, namely, the non-mercantile classes and women, would, out of mere nervousness and anxiety, and without knowing what they were doing, bring themselves within the danger of the prohibitions, and thus be involved in unlimited liability. Entertaining these objections, he would probably have added that there appeared to him a much simpler way of attaining the same end. There was only one single rule of English law—and that not a venerable rule—in the way of commanditarian investments, and he would have expressed the

hope that, when the Indian Law Commissioners sent out the next part of the new civil code, they would be found to have omitted the objectionable rule. Happily, Parliament had followed the very course which he expected the Law Commissioners to take. It had repealed the rule in question; and in this instance had not incurred the reproach so often directed against English legislation, that when the consequences of a legal principle become inconvenient, it never ventures to repeal the principle, but merely cuts off the inconveniences. He would read the first section of the Bill:

'The advance of money by way of loan to a person engaged or about to engage in any trade or undertaking, upon a contract in writing with such person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on such trade or undertaking, shall not, of itself, constitute the lender a partner with the person or the persons carrying on such trade or undertaking, or render him responsible as such.'

The rule adverted to was of course that which the section disaffirmed. Then followed one of those convenient explanations invented by Lord Macaulay and introduced into the Penal and Civil Procedure Codes:

'A person who being entitled, whether as a retiring partner or otherwise, to demand and receive present payment of the value of any share or interest of or in the capital or other funds of a business shall, after the value thereof shall have been ascertained between such person and the person or persons liable to pay the same, allow the same to remain therein or to be used by such person or persons for the purposes of such business, shall be construed to make an advance of money by way of loan within the meaning of this section.'

Mr. Maine then continued: It would perhaps be enough if I stopped there and asked leave to introduce the Bill merely as copied from an English statute. In matters of mercantile law it is obviously desirable that Indian should follow English legislation. But as it may not be clear how the objects attained by commanditarian partnership are secured by a measure like this, I will ask the Council to let me say a few words as to the probable operation of the measure.

I will begin by stating that, in order to place the law of

partnership on the reasonable footing on which it is placed by the Limited Liability Acts, it is not by any means necessary to discredit the general principle of unlimited liability between partners. Even if I thought that principle irrational —which I do not—I should never venture to interfere with it, considering the extent to which it is bound up with all English commerce. But all that is necessary is to set aside certain illogical and artificial applications of it. On what, then, does the principle of unlimited liability depend? It depends on the doctrine that partners are agents for one another with full powers. And indeed it has been laid down by the House of Lords that there is no true law of partnership in England, but that partnership is merely a department of the law of agency. Just, then, as an agent with full powers can bind his principal up to the full extent of his means, so one partner acting within the sphere of the business can bind the others up to the full extent of their powers of payment.

If, however, we reflect, we shall see that there are some applications of the principle of agency to partnership which break down. The principle, for example, breaks down in its application to large joint-stock associations, because the very object of forming those associations is that they may act through an agency of a totally different description, as, for example, a board of directors. There is no reason, nor has there ever been any reason, why the subscribers should not be allowed by public notice to declare the extent to which they intend to limit the power of their agents, and therefore their own liability. This privilege, however, of limiting their liability was conferred on them by recent Joint-stock Company Acts. But at the same time I think that Parliament, in passing those Acts, did not so much overturn or encroach upon as protect the rule of unlimited liability by forbidding a perverse and abusive application of it. It is still more in the interest of the general principle of liability that the rule at which the first section of the Bill is aimed should be set aside. For it is not even a superficially logical consequence of the fundamental principle. The fundamental rule is that partners are agents for each other within the scope of their business.

The derivative rule is that a man becomes a partner by stipulating for a share of the profits of a trader to whom he makes an advance. There is no apparent connection between the two propositions. And the real wonder is how the rule made its way into English law. It is not an old rule : it is no older than the time of Lord Mansfield ; and when the case which established it[1] is examined, it becomes at once evident that the object of the court was to defeat the law of usury. Putting aside the case of negotiable instruments, it was at the time illegal to stipulate for more than 5 per cent. interest, and when a person had bargained for more than the legal rate, not only did the contract fail as regarded the excess above the legal rate, but the entire contract was considered to be tainted with usury and was wholly invalid. Of course the sound ideas which now prevail on the subject of the interest of money had not fully made their way into men's minds. But still people were to some extent alive to the fallacy underlying the usury laws, and the courts of law exerted themselves strenuously to prevent their absurdest consequences. The readiest expedient for defeating them was to rule that the contract which was the subject of suit was not a contract of loan at all, but a contract of a wholly different description. Thus in the case before Lord Mansfield a man had stipulated that he should be remunerated for a loan by a share in the profits of a trading firm. But it turned out on calculation that he had bargained for more than 5 per cent. on his advance. The legal consequence would have been that the contract was invalid. This Lord Mansfield would not allow, and, *ut res magis valeret quam periret*, ruled the contract to be one of partnership, and therefore not invalid. The rule thus established was therefore a mere legal fiction invented to serve a temporary purpose, and, as usual, its collateral inconveniences were greater than its immediate advantage. It has very justly been remarked that, as the rule originated in the usury laws, so it was doomed when those laws were abolished. The state of the law now is that a man may stipulate for what rate of remuneration by way of interest he pleases, so long as the rate is calculated on the

[1] Probably *Bloxam* v. *Pell*, 2 W. Bl. 999.

amount of the advance. If, therefore, a Calcutta merchant, on retiring, leaves a lakh of rupees in his house of business and bargains for 80 per cent. on his ten thousand pounds, the contract is perfectly legal, and he risks nothing more than the lakh of rupees. But if he leaves the same sum in the business and stipulates for 8 or 10 per cent. on the profits, he endangers every shilling and every acre he possesses. It is needless to say which is the fairer arrangement. One is perfectly just and the other sucks the very life-blood out of the firm. Yet it is the policy of the law to discourage the more equitable and to encourage the more inequitable arrangement. I venture to lay down broadly that no argument whatever can be directed against the proposed change of the law which will not tell with tenfold force against the law as it is.

As to possible objections to the Bill, though they are more properly dealt with at another stage, I will notice one which is very commonly taken, because, while it is extremely obvious, the answer to it is not immediately obvious to anybody but a lawyer. It may be asked, if you allow persons to advance money with limited liability upon condition of sharing the profits, what security have you that capitalists will not begin to trade through clerks and agents who are men of straw, while at the same time they will risk less than other traders? I might reply by saying that capitalists might do it now if they framed their contracts properly. The best answer, however, is that this Bill provides no more than that a stipulation for a share in the profits shall not by itself constitute the lender a partner. Such a stipulation will still remain one of the *indicia* of partnership, but it will no longer be conclusive. If there is something more, if the contract bargains for such powers of interference or of removing the ostensible partners, as show that they were intended to be merely agents, or if, without reference to the letter of the contract, such powers are shown to have in fact been exercised, in such a case there will be other ingredients present. The courts in the exercise of their ordinary jurisdiction will no doubt apply the principle of agency and construe the lender to be the partner of the ostensible traders.

And I would much rather trust the courts to put a stop to these malpractices than introduce the minute rules of the French law, which are sure to prove snares to the unwary. Meantime any merchant retiring and leaving any sum of money in his business, and merely bargaining for such a power of inspecting the books as will give him reasonable information as to the state of the firm, will be perfectly safe, and will merely risk the amount which he has deliberately staked.

I will conclude by remarking that, even if I thought the expediency of the new law in England as doubtful as I think it clear, there would still be special reasons for altering the rule of liability in India. In the first place, I am told by a high authority that the Natives of India practise among themselves a system of commanditarian partnership, and that, for example, a capitalist in Calcutta or Delhi will advance money to a merchant in Málwá or Rájputána on condition of being remunerated by a share in the trading profits. But I hear also that the system is giving way under the influence of English law, directly in the presidency towns, and indirectly in the Mufassal. But it is chiefly in the interest of the European firms doing business in the presidency towns that I believe the new law to be desirable. I shall not be contradicted when I say that the constitution of those firms is generally as follows:—There is a series of partners who come out one or two at a time. Each expects to remain a moderate time in the country, to realise a fortune, and to carry it home on retirement. If he obeyed natural motives, the retiring partner would leave a large portion of his fortune in the business, because the interest he would receive would be much more than was obtainable in open market, and because he would be apt to have confidence in partners who would succeed him and whom he has himself chosen. But this rule of English law stands in the way, and years afterwards, the indiscretion of a partner whom he has never seen may cost him the whole of his property. The direct tendency, therefore, of the existing law appears to be this. It produces withdrawals of capital on retirements of partners in a country where those retirements are extraordinarily frequent. The

process is, however, insensible: the public knows nothing about it, and hence the credit and operations of the firm may remain the same as before. I know, indeed, my honourable friends will doubtless tell us that the evil is much mitigated by private arrangements among the partners, under which it is agreed that retiring partners shall not withdraw more than a certain amount of capital within a certain time; and, indeed, I will add, to prevent any misconstruction of my words, that the great actual stability of the leading firms in the presidency towns proves that some process is going on which counteracts the tendency. Still the tendency is distinct, and we may depend that in such a case it has effect in more instances than we are aware of, and perhaps in the majority of instances. That tendency is to withdraw capital without diminishing credit, which is the most unwholesome state of things that can possibly exist in trade. This is not a speculative opinion of mine: indeed I should not venture a speculative opinion on such a point. I had lately the advantage of conversing on this subject with a gentleman who was formerly Chief Justice of the Supreme Court here, and he was convinced that certain insolvencies which were felt at the time throughout India as public calamities—insolvencies of a kind which never occur nowadays—were due to subtractions of capital through fear of unlimited liability. I have obtained the schedules of those insolvencies from the Insolvent Court, and so far as I can understand their story, it seems to me to bear out that theory. And with regard to the question whether advances on limited liability should be publicly registered, I must say that it struck me on reading these schedules that it would be much fairer and juster to the public if we compelled the registration, not of advances made on limited liability, but of amounts withdrawn in consequence of unlimited liability.

The principal recommendation of the Bill I take to be the additional stability it will give to the presidency town firms. But some minor advantages connected with it may be mentioned. One of these relates to all European adventure in India. The notorious difficulty of such undertakings is the difficulty of agency. It is said that plenty of energetic men come out, but I am told that they do not make good

servants. Ample wages and large stipends are not enough; the stimulus of ownership and direct interest is wanted. If, then, such a person were turned into a master through this Bill, if he became, to use the French phrase, the *gérant* of a commanditarian partnership, it is possible that his relation to his employers would be more satisfactory, and, at all events, his motives to good faith and exertion would be greatly increased. There is also a distinct advantage in legalising a second form of limited liability. It may have been observed that the real secret of the enormous expansion of limited undertakings in England is that they have attracted the savings of the non-commercial and professional classes. Every lawyer and every man of business knows that those classes were formerly tied down to Government securities and land. But now the capital they save is largely embarked on limited liability, and is thus reproductively employed. There is, however, this moral drawback on the change—that investors can only now procure a security which is of a marketable value, and which fluctuates within much wider limits than Consols or Government paper. It may therefore be that some persons are tempted to engage in speculation who would not otherwise have indulged in it, and who are not well fitted for it. I myself do not believe that any state of the law produced, or that any change in the law will change the spirit of speculation which lately prevailed in this country, and particularly on the other side of it. But I do think that, to some limited extent, it was stimulated and aggravated by the fact that no Native who invested on limited liability out of his hoard, nor servant of Government out of his savings, could obtain any securities which had not a highly speculative value. It is therefore some recommendation of this Bill that interests created under it will not generally be saleable. Even supposing that the alienation of such an interest should become abstractedly legal in India, the contract will in fact stipulate that it shall not be sold without the consent of the firm to which the advance is made; and thus the Bill may perhaps redress the balance between two forms of limited liability, which appears to me to have inclined too much in one direction.

OVER-LEGISLATION

DECEMBER 14, 1866.

MUCH annoyance and some difficulty were caused to Mr. Maine, both before and after leaving India, by the ignorant impatience of legislation displayed by the Indian press,[1] and by certain members of the covenanted Civil Service. This impatience led to charges of precipitate and excessive legislation on the part of the Governor General's Council, and in 1866 Mr. Maine felt it necessary to reply to these charges. In moving for leave to introduce Bills to extend to the Straits' Settlement (then part of British India) the Indian Penal Code and the Indian Succession Act, Mr. Maine said that

very little of Indian legislation had been extended to the Straits, and none of the greater enactments. It was not to be denied that there had been, for long, much repugnance in the Straits' Settlement to its being brought under Indian law. How far the feeling was shared by the general community, he could not say ; but if it was so shared, he should be disposed to attribute it to that impression of a diversity of interests which had caused the separation of the Settlement from the rest of the Indian Empire. At all events, the judges and the legal profession were unquestionably opposed to the extension of Indian legislation to the Settlement, and the Local Government constantly protested against its inclusion. Thus it resulted that, in the former Legislative Council, the Straits were as a matter of course exempted from the operation of Indian statutes. More recently there appeared to have been a change of feeling, and complaints had been received that the Straits were deprived of the benefits of Indian legislation. In this state of things, a section was added to recent enactments, empowering the Governor of the Straits' Settlement to extend their provisions to the territory under his jurisdiction, though, owing to the non-extension of the Codes of Civil and Criminal Procedure, the judicial and administrative system of the Straits differed so widely from that of India, that the Council could not take upon itself to describe those courts and officers by whom the powers given were to be exercised. Still more recently the negotiation between the India and

[1] *The Friend of India*, then conducted by Dr. Geo. Smith, was an honourable exception.

Colonial Offices for the separation of the Straits from India had come to a successful issue, and an Act of Parliament had been passed during the last session, under which the Queen was enabled, by an Order in Council, to declare the time at which the Settlement would become independent.[1] No sooner was this result known, than we received from the Straits' Government a series of urgent requests that the Settlement should not be allowed to separate until a large part of Indian legislation had been extended to it. In particular, it was asked that the Penal Code and the Succession Act, which was the first part of the Civil Code, should be made applicable to the Straits. It seemed to him likely that further requests of the same nature would be received.

The Council would probably agree with him that this change of feeling was not a little remarkable; and, as this was the first meeting of the Council, he would propose to contrast the spirit of these applications with that of some criticisms contained in a paper which had possibly been circulated, and which it would be his duty to notice sooner or later. One of the judges of the High Court of Madras, with whom he had not the advantage of personal acquaintance, but who was reputed to unite the best characteristics of the barrister and civilian elements of those tribunals, had remarked as follows on a proposal to extend certain formalities prescribed by the Succession Act to the execution of wills by Muhammadans and Hindús:—

'In conclusion, I have to express the great reluctance with which I furnish an opinion favouring further legislation. I regard the rapidity with which legislation is now proceeding as a very great evil. If it continues, I do not think that either judges or practitioners, and still less the public, will know from day to day the law which governs them. Statutes, unless very carefully constructed, do not afford certainty, but doubt; and litigation is not repressed, but aggravated, by every fresh enactment.'

Now, it would perhaps be sufficient to contrast this passage with the implied criticism of the judges and Government of the Straits' Settlement. It was not unfair to say that the Settlement wished to retain nothing of India except Indian legislation; but a further reply than that was necessary. If

[1] 29 & 30 Vic. c. 115.

Mr. Holloway's opinion had stood by itself, Mr. Maine would probably not have noticed it, for the truth was that learned lawyers were the natural enemies of legislation, which impaired the completeness and symmetry of their knowledge. But the same feeling had been exhibited in other quarters; and Mr. Maine thought he could not too soon meet the charge of precipitate and excessive legislation on the part of that Council. He did not deny that when the annual Statute-book was looked at by itself, it might be observed with surprise or dismay that the annual production of laws was about thirty. But no just conclusion could be reached unless there were a further examination as to the classes of enactments which the book comprised, and the proportion which one class bore to another. Mr. Maine would divide the Acts of the Indian Legislature into four classes—a division only rough, but practically sufficient.

The first of these classes was one of serious importance, and it was probably from vague associations with it that people had begun to speak of dangerous over-legislation. This class consisted of enactments affecting the civil usages or religious opinions of the people of the country. There could hardly be any censure too heavy for the Council if it really did pass such measures with incaution and precipitancy. He did not acquiesce in that interpretation which had been sometimes put on the proclamation issued by the Queen on assuming the direct Government of the country, and which apparently pledged Her Majesty to surrender the power which was the sole moral justification for our being in the country at all—power to improve its institutions—but he fully admitted that it would be the worst policy to pass measures of this class without the maturest consideration and the most scrupulous regard for the feelings of the people. But how did the facts really stand? Since Mr. Maine had been in India—that was four years—he could only remember two measures which could distantly be described as disturbing or affecting Native custom or Native religious opinion. One was the Native Christian Marriage Dissolution Act passed last session, the other was the Registration Act. The latter was much more serious than the former, inasmuch as it added a

formality to the majority of civil transactions, penetrating into every corner of Native life. He was not going to defend those measures, but he wished to call attention to the duration of the discussion on them. Proposals for registration had been before the Government for thirty-six years, and the Bill itself for six and a half years before the Council. Again, the principle of the Converts' Dissolution of Marriage Act had probably been discussed ever since there had been missionaries in India. But the proposal ultimately adopted was under active discussion for thirty-two years, and the Bill itself was two years under the consideration of the Legislature. He would mention one other enactment which might possibly be supposed to come under the class as affecting a portion of the community not numerically large, but of great importance. This was the Act erroneously called the Act for abolishing Grand Juries, but more properly entitled an Act for enabling Europeans to be tried elsewhere than in the Presidency Towns. It was founded on a report of the Indian Law Commissioners, dated in 1853, and the Bill passed in 1865, so that the subject had been twelve years under discussion. In admitting, therefore, that the Council would be censurable if it passed enactments of this class without the fullest deliberation, he was bound to state what the facts were, that the class consisted of only three measures discussed during an average period of four-and-twenty years.

The second of the classes into which he divided Indian legislation was intended to bring up law which was common to England and India to the pitch of improvement which it had reached at home. He could remember but four enactments of the sort passed of late years. The two Trustee Acts [1] recently passed at Simla, the Mercantile Law Amendment Act,[2] and the Indian Companies Act.[3] Nobody, he supposed, would charge the British Parliament with precipitate legislation, and certainly the immediate framers of the two Acts first mentioned—Lord St. Leonards and Lord Justice Turner—could not be accused of feverish zeal for reform. The truth was that the Indian Legislature had, in enactments of

[1] Acts XXVII. and XXVIII. of 1866.

[2] Act V. of 1866.

[3] Act X. of 1866.

this class, lagged far behind the English Parliament, and one measure in particular—the Indian Companies Act—had barely been passed in time, as recent occurrences in Bombay had abundantly proved.

Mr. Maine now approached the third class—of an importance which it was hardly possible to over-estimate—the Codes. Three of them were passed by the former Legislative Council—the Penal Code, and the Codes of Civil and Criminal Procedure. This Council had as yet passed but one single chapter of the fourth code—the Succession Act—but he might mention that one enactment—the Partnership Amendment Act—was in reality part of the Civil Code. Mr. Maine had stated at the time that the law was in anticipation of the code, and this was proved, for the Act was embodied in the draft code of the Law of Contracts which the Indian Law Commission had just sent out. The responsibility for the codes was shared between this Council and the Indian Law Commissioners. The Commissioners sent out the first draft, and, in the case at all events of the Indian Civil Code, it had been accepted by the Council with but slight alteration. He wished, however, not to put off the responsibility on other persons, but to meet the objection that the codes added to the law and rendered it unintelligible to the people. Mr. Maine ventured to lay down exactly the opposite proposition; the codes enormously reduced the bulk of the law, and rendered it for the first time intelligible to the people. He would not enter into the general question of codification. His own observation showed him that the vulgar prejudice against codification had greatly decayed in England, and had given way to deep regret that the characteristics of English law were such as to render it, if not impossible, at all events enormously difficult, to reduce it to a code. But the question for the Council was, how far had the Indian codes rendered law unintelligible or bulky in India? Mr. Maine did not himself recollect the state of the law in India before the three codes which were already law. But there were gentlemen in the Council who perhaps had administered that law either as judges or as magistrates. He should be surprised if they did not bear out his impression, which of course rested on hearsay,

that nothing could exceed its uncertainty, confusion, and intricacy. It was true that the codes of the Non-Regulation Provinces, which were descended from the Panjáb code, were greatly simpler. But being clothed in half-popular language, they had a natural tendency to become overlaid with glosses and interpretations. When the last of them, the civil procedure of the Panjáb, was superseded the other day by the code, it was not too much to say that it consisted of a mountain of circulars. But now, looking to the Civil Code, with which alone the Council was concerned, would it, by passing the chapters of the code at the rate of about one in two years, lay itself open to the imputation of increasing the massiveness or the unintelligibility of the law? What was the civil law of India at this moment, apart from the religious law, which included the law of intestate succession, and which the Code did not propose to touch, and apart from the law of land, which stood on a footing of its own? It consisted, in the first place, of Native usages, which differed not only from province to province, but from district to district and from family to family. It consisted, further, of the writings of Hindú and Muhammadan jurists, so vague from the confusion of ethical with legal rules, that it was hardly possible to extract a trustworthy conclusion, or, what was worse, that it was possible to extract two conflicting conclusions, each equally trustworthy with the other. There were, further, the old Regulations, which were certainly not remarkable for precision of language, and there were, further, a few principles—few, that was to say, as compared with the whole mass of legal principles—decided by the late Supreme and Sadr Courts, and by the Privy Council. There were great chapters of law on which, in India, there was no indigenous system of rules of any sort. Contract, for example, was utterly unregulated, except by some small portion of Muhammadan jurisprudence.

Now, was that state of things satisfactory? No doubt, the answer of some persons would be that if the people were contented, it was no business of the Government or the Council. But the truth was there was an influence in India which tended to simplify this confusion. That was the influence of English law, not as modified by the codes, but of

English law pure and simple. It was all very well in theory to say that an Indian Mufassal judge decided by Native usage, 'equity and good conscience;' but in practice, if he did anything of the kind, his reputation would suffer. The court which revised his decision would insist upon his applying a stricter rule than could be got out of equity and good conscience, and the rule applied would be one mediately or immediately derived from English law. Now was that a process which an English Government, conscious of its own responsibilities, could allow to go on without check? Mr. Maine was not likely to say any evil of English law; but it was certainly one of the most difficult systems of law in the world, and its compass was enormous. Its *corpus juris* was a law-library of a thousand volumes. How many law-libraries were there in India? Probably twenty at the outside. But could there be conceived a more intolerable hardship than that 150 millions of people should have their civil rights dependent on a system contained in records which were inaccessible to them, which they could not translate, and which, if they could translate, they could not understand? Some persons answered that this was immaterial so long as there was a learned profession competent to expound the law, and urged that in England no one except a professional man understood the law, or would act without the advice of legal practitioners. That was true, but it was a peculiarity of England, and not an honourable one, and not one which Englishmen should carry all over the world with them. At the same time, in England there was a legal profession spread over the country, from whom a trustworthy opinion could always be obtained. But how many persons were there in India who, considering the invasion of the country by English law, could give such an opinion? Probably outside the presidency towns they could be counted on one's fingers.

It seemed to him, therefore, a matter of simple duty to the people that the labours of the Indian Law Commissioners should proceed. The only possible remedy for the state of things he had described was a code which, without going overmuch into detail, should set forth fundamental principles with as much simplicity as was compatible with accuracy.

Such a code would perfectly well fit in with Native usage when it was wholesome; nor was there any fear that English law, characterised as it was by good sense and logical coherence, would fail to supply the greatest part of the material.

The fourth and last class was the most numerous of all. Probably it was by not noticing the proportion which this class bore to the rest of the enactments that people had obtained the impression of excessive legislation. It would have to be remembered that this Council was not simply the Imperial Legislature, but the local legislature for all provinces which had not got councils of their own. From Lower Bengal, Madras, and Bombay, there were hardly any applications for legislation at all. The few Bills that came from those provinces were necessitated by a technical difficulty, namely, that by the letters patent of the High Courts the local Councils were prohibited from interfering with the jurisdiction of those tribunals. But from those provinces which had no legislatures of their own there was a constant stream of applications for legislative enactments. Now, what was the character of those enactments? They were merely local Bills. They did not create rights or obligations. They merely affected the machinery by which rights were protected or declared. They simply carried out small judicial or administrative improvements. The fact was that the country was passing from an administrative to a legal condition, from a state in which good government depended on the energy of individuals, into a state in which it depended on adherence to well-considered rules. There were some, Mr. Maine knew, who looked on the process as wholly evil. The farther you got from Calcutta, the more you heard the complaint that law was paralysing administration. All that could be said in reply was that the change was inevitable. Energetic administration in the ruder provinces produced wealth, security, and comfort, and the infallible result was a wish to have rights of enjoying property regulated by fixed law, and a disinclination to allow those rights to vary with the varying theories of successive administrators. Mr. Maine thought he understood what was meant by the assertion that

law paralysed administration. But certainly the last person to object to the fruits of the change should be a judge of a High Court, because the moving cause was undoubtedly a growing taste for legality, fostered, probably, by the strengthening of the higher tribunals, and particularly of the High Courts. There were examples of the change and of the demand which it had produced in the legislation submitted to the Council. There was an example in the Hon. Mr. Brandreth's Bill for establishing municipal committees in the Panjáb. There was a practice existing which the local Government held to be healthy, useful, and convenient. Suddenly some ingenious person discovered that it rested on no legal foundation. Thereupon the Local Government came to the Council for a Bill to legalise it. Or take the converse case, in the Bill for the suppression of gambling, of which the Hon. Mr. Riddell was in charge. The Local Government had had its attention drawn to the prevalence of public gambling in large cities as productive of all evil. Now, did anybody suppose that, thirty years ago, if a person in the position of the Lieutenant Governor of the North-Western Provinces, or the Chief Commissioner of British Burma, had made up his mind that public gambling was productive of crime, he would have come for a Bill to this Council? Why, he would have told his police to put it down, or issued his orders to the district officer. But nowadays, quite reasonably and properly, he came to us for a Bill. These Bills, providing for small judicial or administrative changes, were and must be constantly required. When such a measure was strongly recommended by the Local Government, Mr. Maine held that this Council would be heavily responsible if it declined legislation. At all events, the executive Government would be censurable if it did not submit to the Council a Bill to legalise the change. It would be the merest pedantry to stereotype legislation of this sort. In a country in which those who knew most of a people knew little of them, our system of government must necessarily be tentative, and small administrative improvements must be from time to time required and conceded. If it were true that there was too superstitious a regard for legality, the

proper remedy was an active legislation. For these reasons Mr. Maine considered that this class of local Bills could never fall off very much in number; and it was further inevitable that they should constantly take the form of Bills amending Acts, not because the hand or mind of the legislator was uncertain, but because the material of policy upon which he worked was from its very nature shifting. Mr. Maine hoped that every Bill submitted to the Council at these sittings would be found not only justifiable but incapable of postponement. He himself would be personally glad if the spell of an annual sitting, except for financial measures, could be broken; but he trusted it would be seen that no one of the measures now proposed for consideration could have been put aside or delayed without injury to good government.

As regarded the particular Bills before the Council, the first of them merely proposed to extend the Penal Code to the Straits. A short Bill, separately before the Council, provided for certain consequences arising from the definition of the word 'offence' in the Penal Code. That Bill had been embodied in the second section of this measure. Some papers had come in which suggested still further change in the same direction, but he trusted the discussion on these points would be taken on the separate Bill, and not on the measure now submitted.

As regarded the Bill to extend the Succession Act to the Straits' Settlement, it was another of the class of Bills which had been asked for by the Local Government. The Bill proposed to extend the Act, but with two important modifications. Here in India the operation of the Act was excluded in the case of the Hindús, Muhammadans, and Buddhists; the result was that it affected a comparatively small class of the community, and its great importance was the indirect effect that it would be sure to have on the Native law of succession. The Local Government wished the Act to be made the *lex loci*, without distinction of race or creed; but the Straits' Settlement was a community of an omnigenous character, and if the Succession Act was to be applied, provision would have to be made for two matters. First, as in the case of many primitive races, a part of the population practised

adoption. The Bill accordingly provided that, for the purposes of intestate and testamentary succession, an adopted son should be considered a legitimate child of his adoptive and not of his natural father. The provision was so far in accordance with the Hindú law, but omitted the inequitable rule that in case of a son being born to the adoptive father subsequently to the adoption, the share of the adopted son should be only one-fourth of that of the natural-born son. Secondly, there were many persons in the Straits whose marriage law permitted a plurality of wives. It would be absurd to apply to such persons the rule that marriage should operate as a revocation of a will. The Bill accordingly provided that, in the case of a polygamist, his will should not be revoked merely by his marriage. Provision was also made for the case of his dying intestate and leaving several widows.

The same subject is discussed in the following minute, dated October 1, 1868 :—

The accompanying paper, 'showing in each case the authority at whose suggestion the Acts of the Governor General in Council, from No. I. of 1865 to No. XXXVII. of 1867, were passed,' has been already seen by the Viceroy and my colleagues. I have to admit that it was originally prepared to furnish materials for an answer to statements which I regarded as conveying some degree of censure on myself. It seemed to me that many persons, to whose opinion great respect is due, were getting more and more to believe or suspect that legislation in India was unnecessarily profuse, and that its abundance was attributable either to morbid activity in the Law Member of Council, or to something faulty in the constitution of the Legislature. So long as such statements were couched in general terms, it appeared to me difficult or impossible to meet them satisfactorily, since it is undoubtedly true that legislation in India has not slackened, as it was expected to do, and even shows a tendency to increase. Something, therefore, like a brief historical analysis of recent legislation appeared to be required, and this the paper gives, though of course within scanty limits. The fact, however, that it was compiled for a reason in some degree personal will explain why the inquiry, of which it states the

results, was not carried back beyond the beginning of 1865. The documents relating to proposals for legislation which are in the Legislative Department are exceedingly numerous and voluminous, and the labour of analysing them proportionately heavy. I did not think myself justified in directing the inquiry to be continued through any greater number of past years, but there is no reason to suppose that, if it had been so continued, it would have suggested any different inferences.

It may be necessary to explain that the communication mentioned in the third column is always the one in which the request for legislation was first distinctly made by the Local Government or authority indicated. But in several cases it was preceded by correspondence more or less leading up to legislation, and in many, indeed in most, cases it was followed by communications reiterating the demand for a legislative measure, often in language of extreme urgency.

I proceed to state the conclusions to which this paper seems to me to point. If the members of Government do not agree in those conclusions, I shall certainly be surprised, but I can hardly say I shall be disappointed. Nothing would give me sincerer gratification than any practical suggestion of an expedient for reducing the quantity of our legislation and sensibly diminishing the annual addition to the Indian statute-book.

The first conclusion which I draw is that next to no legislation originates with the Government of India. The only exceptions to complete inaction in this respect which are worth mentioning occur in the case of Taxing Acts—though, as there is often much communication with the local Governments on the subject of these Acts, the exception is only partial—and in that of a few Acts adapting portions of English statute law to India. Former Indian legislatures introduced into India certain modern English statutes limiting their operation to 'cases governed by English law.' The most recent English amendments of these statutes were, however, not followed in this country until they were embodied in Indian Acts by my predecessor, Mr. Ritchie, and myself, in accordance with the general wish of the bench and bar of the High Courts. Examples of this sort of legislation

are Acts XXVII. and XXVIII. of 1866, which only apply to 'cases governed by English law.'

The second, and much the most important, inference which the paper appears to me to suggest is, that the great bulk of the legislation of the Supreme Council is attributable to its being the local legislature of many Indian provinces. At the present moment, the Council of the Governor General for making Laws and Regulations is the sole local legislature for the North-Western Provinces, for the Panjáb, for Oudh, for the Central Provinces, for British Burma, for the petty province of Coorg, and for many small patches of territory which are scattered among the Native States. Moreover, it necessarily divides the legislation of Bengal Proper, Madras, and Bombay with the local Councils of those provinces. For, under the provisions of the High Courts Act of 1861,[1] it is only the Supreme Legislature which can alter or abridge the jurisdiction of the High Courts, and, as this jurisdiction is very wide and far-reaching, the effect is to throw on the Governor General's Council no small amount of legislation which would naturally fall on the local legislatures. Occasionally, too, the convenience of having but one law for two provinces, of which one has a Council and the other has none, induces the Supreme Government to legislate for both, generally at the request of both their Governments.

Now, these provinces for which the Supreme Council is the joint or sole legislature exhibit very wide diversities. Some of these differences are owing to distinctions of race, others to differences of land-law, others to the unequal spread of education. Not only are the original diversities between the various populations of India believed nowadays to be much greater than they were once thought to be, but it may be questioned whether, for the present at all events, they are not rather increasing than diminishing under the influence of British government. That influence has no doubt thrown all India more or less into a state of ferment and progress, but the rate of progress is very unequal and irregular. It is growing more and more difficult to bring the population of two or more provinces under any one law which goes closely home to their daily life and habits.

[1] 24 & 25 Vic. c. 104.

Not only, then, are we the local legislature of a great many provinces, in the sense of being the only authority which can legislate for them on all or certain subjects, but the condition of India is more and more forcing us to act as if we were a local legislature of which the powers do not extend beyond the province for which we are legislating. The real proof, therefore, of our over-legislation would consist, not in showing that we pass between thirty and forty Acts in every year, but in demonstrating that we apply too many new laws to each or to some one of the provinces subject to us. Now, I will take the most important of the territories for which we are exclusively the legislature—the North-Western Provinces—and I will take the year in which, judging from the paper, there has been most North-Western legislation—the year 1867. The amount does not seem to have been very great or serious. I find that in 1867, if Taxing Acts be excluded, the North-West was affected in common with all or other parts of India by an Act repressive of Public Gambling (No. III.); by an Act for the Registration of Printing Presses (No. XXV.); and by five Acts (IV., VII., VIII., X. and XXXIII.) having the most insignificant technical objects. I find that it was exclusively affected by an Act (I.) empowering its Government to levy certain tolls on the Ganges; by an Act (XXII.) for the Regulation of Native Inns; by an Act (XVIII.) giving a legal constitution to the courts already established in a single district; and by an Act (XXVIII.) confirming the sentences of certain petty criminal courts already existing. I find further that, in the same year, 1867, the British Parliament passed 85 Public General Acts applicable to England and Wales, of which one was the Representation of the People Act. The number of Local and Personal Acts passed in the same year was 188. All this legislation, too, came, it must be remembered, on the back of a vast mass of statute law, compared with which all the written law of all India is the merest trifle. Now, the population of England and Wales is rather over 20 millions, that of the North-Western Provinces is supposed to be above 30 millions. No trustworthy comparison can be instituted between the two countries; but, regard being had to their

condition thirty years ago, it may be doubted whether, in respect of opinions, ideas, habits and wants, there has not been more change during thirty years in the North-West than in England and Wales.

A third inference which the paper suggests is that our legislation scarcely ever interferes, even in the minutest degree, with private rights, whether derived from usage or from express law. It has been said by a high authority that the Indian Legislature should confine itself to the amendment of Adjective Law, leaving Substantive Law to the Indian Law Commissioners. It is meant, no doubt, that the Indian Legislature should only occupy itself, *proprio motu*, with improvements in police, in administration, in the mechanism and procedure of courts of justice. This proposition appears to me a very reasonable one in the main, but it is nearly an exact description of the character of our legislation. We do not meddle with private rights; we only create official duties. No doubt Act X. of 1865 [1] and Act XV. of 1866 [2] do considerably modify private rights, but the first is a chapter and the last a section of the Civil Code framed in England by the Law Commissioners.

The paper does not, of course, express the urgency with which the measures which it names are pressed on us by their originators—the Local Governments. My colleagues are, I believe, aware that the earnestness with which these Governments demand legislation, as absolutely necessary for the discharge of their duties to the people, is sometimes very remarkable. I am very far indeed from believing that, as they are now constituted, they think the Supreme Council precipitate in legislation. I could at this moment name half a dozen instances in which the present Lieutenant Governors of Bengal and the North-West deem the hesitation of the Government of India in recommending particular enactments to the Legislature unnecessary and unjustifiable.

While it does not seem to me open to doubt that the Government of India is entirely free from the charge of initiating legislation in too great abundance, it may nevertheless be said that we ought to oppose a firmer resistance

[1] The Indian Succession Act.

[2] The Partnership Act.

to the demands of the Local Governments and other authorities for legislative measures. It seems desirable, therefore, that I should say something of the influences which prompt these Governments, and which constitute the causes of the increase in Indian legislation. I must premise that I do not propose to dwell on causes of great generality. Most people would admit that, for good or for evil, the country is changing rapidly, though not at uniform speed. Opinion, belief, usage, and taste are obviously undergoing more or less modification everywhere. The standard of good government before the minds of officials is constantly shifting, perhaps it is rising. These phenomena are doubtless among the ultimate causes of legislation; but, unless more special causes are assigned, the explanation will never be satisfactory to many minds.

I will first specify a cause which is in itself of a merely formal nature, but which still contributes greatly for the time to the necessity for legislation. This is the effect of the Indian Councils Act of 1861[1] upon the system which existed before that date in the non-regulation provinces. It is well known that, in the strict sense of the word, the Executive Government legislated for those provinces up to 1861. The orders, instructions, circulars, and rules for the guidance of officers which it constantly issued were, to a great extent, essentially of a legislative character, but then they were scarcely ever in a legislative form. It is not matter of surprise that this should have been so, for the authority prescribing the rule immediately modified or explained it, if it gave rise to any inconvenience, or was found to be ambiguous. But the system (of which the legality had long been doubted) was destroyed by the Indian Councils Act. No legislative power now exists in India which is not derived from this statute; but to prevent a wholesale cancellation of essentially legislative rules, the 25th section gave the force of law to all rules made previously for non-regulation provinces by or under the authority of the Government of India, or of a Lieutenant Governor. By this provision an enormous and most miscellaneous mass of rules, clothed to a great extent in general and popular language, was suddenly established as law, and invested with solidity and unchangeableness to a degree which its authors had never

[1] 24 & 25 Vic. c. 67.

contemplated. The difficulty of ascertaining what is law and what is not in the former non-regulation provinces is really incredible. I have, for instance, been seriously in doubt whether a particular clause of a circular intended to prescribe a rule or to convey a sarcasm. The necessity for authoritatively declaring rules of this kind, for putting them into precise language, for amending them when their policy is doubted, or when tried by the severer judicial tests now applied to them they give different results from those intended by their authors, is among the most imperative causes of legislation. Such legislation will, however, diminish as the process of simplifying and declaring these rules goes on, and must ultimately come to a close.

I now come to springs of legislation which appear to increase in activity rather than otherwise. First among these I do not hesitate to place the growing influence of courts of justice and of legal practitioners. Our courts are becoming more careful of precise rule both at the top and at the bottom. The more careful legal education of the young civilians and of the younger Native judges diffuses the habit of precision from below; the High Courts, in the exercise of their powers of supervision, are more and more insisting on exactness from above.

An even more powerful influence is the immense multiplication of legal practitioners in the country. I am not now speaking of European practitioners, though their number has greatly increased of late, and though they penetrate much further into the Mufassal than of old. The great addition, however, is to the numbers and influence of the Native Bar. Practically, a young educated Native, pretending to anything above a clerkship, adopts one of two occupations—either he goes into the service of Government, or he joins the Native Bar. I am told, and I believe it to be true, that the Bar is getting to be more and more preferred to Government service by the educated youth of the country, both on the score of its gainfulness and on the score of its independence.

Now the law of India is at present, and probably will long continue to be, in a state which furnishes opportunity for the suggestion of doubts almost without limit. The older

written law of India (the Regulations and earlier Acts) is declared in language which, judged by modern requirements, must be called popular. The authoritative Native treatises on law are so vague that, from many of the dicta embodied in them, almost any conclusion can be drawn. More than that, there are, as the Indian Law Commissioners have pointed out, vast gaps and interspaces in the substantive law of India: there are subjects on which no rules exist; and the rules actually applied by the courts are taken, a good deal at haphazard, from popular text-books of English law. Such a condition of things is a mine of legal difficulty. The courts are getting even more rigid in their demand of legal warrant for the actions of all men, officials included. The lawyers who practise before them are getting more and more astute, and render the difficulty of pointing to such legal warrant day by day greater. And unquestionably the Natives of India, living in the constant presence of courts and lawyers, are growing every day less disposed to regard an Act or order which they dislike as an unkindly dispensation of Providence, which must be submitted to with all the patience at their command. If British rule is doing nothing else, it is steadily communicating to the Native the consciousness of positive rights, not dependent on opinion or usage, but capable of being actively enforced.

It is not, I think, difficult to see how this state of the law, and this condition of the courts and bar, renders it necessary for the Local Governments, as being responsible for the efficiency of their administration, to press for legislation. The nature of the necessity can best be judged by considering what would be the consequences if there were no legislation, or not enough. A vast variety of points would be unsettled until the highest tribunals had the opportunity of deciding them, and the government of the country would be to a great extent handed over to the High Courts, or to other courts of appeal. No court of justice, however, can pay other than incidental regard to considerations of expediency, and the result would be that the country would be governed on principles which have no necessary relation to policy or statesmanship. It is the justification of legislation that it settles difficulties as soon as they arise, and settles them upon

considerations which a court of justice is obliged to leave out of sight.

The consequences of leaving India to be governed by the courts would, in my judgment, be most disastrous. The bolder sort of officials would, I think, go on without regard to legal rule until something like the deadlock would be reached with which we are about to deal in the Panjáb, where, if the proportions indicated by the statistics of a single district are maintained throughout the province, the settlement officers have given about a million and a half of most formidable decisions upon fundamental rights to property in land, while the Chief Court has ruled that about seven hundred thousand of these decisions are bad in law.[1] But the great majority of administrative officials, whether weaker or less reckless, would observe a caution and hesitation for which the doubtful state of the law could always be pleaded. There would, in fact, be a paralysis of administration throughout the country.

The fact established by the paper that the duties created by Indian legislation are almost entirely official duties, explains the dislike of legislation which occasionally shows itself here and there in India. I must confess that I have always believed the feeling, so far as it exists, to be official, and to correspond very closely to the repugnance which most lawyers feel to having the most disorderly branch of case-law superseded by the simplest and best drawn of statutes. The truth is, that nobody likes innovations on knowledge which he has once acquired with difficulty. If there was one legislative change which seemed at the time to be more rebelled against than another, it was the supersession of the former civil procedure of the Panjáb by the Code of Civil Procedure. The civil procedure of the Panjáb had originally been exceedingly simple, and far better suited to the country than the then existing procedure of the regulation provinces. But two years ago it had become so overlaid by explanations and modifications conveyed in circular orders that I do not hesitate to pronounce it as uncertain and difficult a body of rules as I ever attempted to study. I can speak with confidence on the point; for I came to India strange both to the Code of Civil Procedure and to the civil procedure of the

[1] See below, pp. 268, 269.

Panjáb, and, while the first has always seemed to me nearly the simplest and clearest system of the kind in the world, I must own I never felt sure in any case what was the Panjáb rule. The introduction of the code was, in fact, the merest act of justice to the young generation of Panjáb officials, yet the older men spoke of the measure as if some ultra-technical body of law were being forced on a service accustomed to courts of primitive simplicity.

It must, on the other hand, be admitted that in creating new official duties by legislation we probably in some degree fetter official discretion. There is no doubt a decay of discretionary administration throughout India; and, indeed, it may be said that in one sense there is now not more, but much less, legislation in the country than formerly; for, strictly speaking, legislation takes place every time a new rule is set to the people, and it may be taken for granted that in earlier days collectors and commissioners changed their rules far oftener than does the Legislature at present. The truth is, discretionary government is inconsistent with the existence of regular courts and trained lawyers, and since these must be tolerated the proper course seems to me not to indulge in vague condemnation of legislation, but to discover expedients by which its tendency to hamper discretion may be minimised. One of these may be found in the skilful drafting of our laws—in confining them as much as possible to the statement of principles and of well-considered general propositions, and in encumbering them as little as possible with detail. Another may be pointed out in the extension of the wholesome practice of conferring by our Acts on Local Governments or other authorities the power of making rules consistent with the Act—a power in the exercise of which they will be assisted by the Legislative Department under a recent order of His Excellency. Lastly, but principally, we may hope to mitigate the inconveniences of legislation by the simplification of our legislative machinery as applied to those less advanced parts of the country where a large discretion must inevitably be vested in the administrator. The power of easily altering rules when they chafe, and of easily indemnifying officials when they transgress rules in good

faith, is urgently needed by us in respect of the wilder territory of India.

While I admit that the abridgment of discretion by written laws is to some extent an evil—though, under the actual circumstances of India an inevitable evil—I do not admit the proposition which is sometimes advanced that the Natives of India dislike the abridgment of official discretion. This assertion seems to me not only unsupported by any evidence, but to be contrary to all the probabilities. It may be allowed that in some cases discretionary government is absolutely necessary; but why should a people which measures religious zeal and personal rank and respectability by rigid adherence to usage and custom have a fancy for rapid changes in the actions of its governors, and prefer a regimen of discretion, sometimes coming close upon caprice, to a regimen of law? I do not profess to know the Natives of this country as well as others, but if they are to be judged by their writings they have no such preference. The educated youth of India certainly affect a dislike of many things which they do not care about, and pretend to many tastes which they do not really share; but the repugnance which they invariably profess for discretionary government has always seemed to me genuinely hearty and sincere.

JUDICIAL TAXATION

MARCH 1, 1867.

THE primary object of the Bill referred to in the following remarks was to replace schedule B of the Stamp Act of 1862 by a schedule so framed that a larger revenue might be derived from suitors.

Mr. Maine, after acknowledging the services of the committee on whose recommendations the Bill was framed,

wished to reply by anticipation to certain objections of a general character which might be urged against their recommendations. His Excellency the president would remember that, when it was originally proposed that this committee should be formed, a distinguished officer of Government had, without expressing any opinion as to the existing scale of duties, stated that he had a general objection to judicial taxation, and requested to

be relieved from service on the committee. The same general objection had been repeated in some papers which had fallen under Mr. Maine's observation, and in particular in a letter from the Bombay Chamber of Commerce. Mr. Maine believed that there was a complete answer to that objection, and it would be well that it should be stated. No doubt all generalities were every day becoming more and more formidable in India; but there was a special reason for distrusting all general propositions as to taxes on judicial proceedings after the facts and arguments adduced by his honourable friend Mr. Hobhouse had received proper attention. If there were one general proposition which at first sight seemed clearer than another in connection with this subject, it was that it was improper to require a stamp on applications to the criminal courts for the redress of wrong. Mr. Maine felt sure that if the question had been submitted five or six years ago to him, as it was to the present Chief Justice of Bengal, whether certain petitions to the criminal courts should be taxed, he should have agreed with Sir Barnes Peacock. Yet, what had been the practical result of this relaxation of the stamp law? They had it on irrefragable authority that the result had been to produce seventy-five per cent. of demonstrably false accusations—accusations the greater number of which were not persevered in, the accuser having gained his point by the fact of accusing, the remainder being rejected by the courts. This astounding fact might well make them cautious as to minor, and therefore less hazardous generalities, on the subject of judicial taxes in India. But it still remained to refute the more sweeping generalisation that judicial taxes in all countries were mischievous and improper. Mr. Maine was convinced that his right honourable friend Mr. Massey[1] would concur with him in saying that the opinion against judicial taxation was extremely modern. For centuries on centuries there had seemed to be nothing more simple or natural than that the parties to a dispute should remunerate the authority by whom their differences were arranged. No doubt, in modern Europe the mistake had

[1] The Right Hon. W. N. Massey, formerly Chairman of Committees in the House of Commons, and in 1867 in charge of the Financial Department of the Government of India.

been made of allowing judicial fees to go into the pocket of the Judge himself, and not into the exchequer of the State that paid him. This had led in France, before the Revolution, by a perfectly logical association, to the sale of judicial offices; and in England, though it had always been illegal to traffic in such offices, the same result had practically been obtained by the creation of sinecures which were conferred on relations of the Judge. Against such scandals and abuses Jeremy Bentham, now not far short of a hundred years ago, protested with all the vehemence of which he was capable, and Mr. Maine ventured to say that the opinion against judicial taxation was entirely produced by Jeremy Bentham, and was not older. It was true, as Mr. Hobhouse had observed, that Jeremy Bentham's opinions in this respect had not been practically carried out at home, and that large amounts were still levied in the form of judicial taxes in aid of the payments which the State made to its judicial officers. But the truth was, that Bentham's name was now so great in England that even those views of his which had never been acted upon had obtained currency and importance in the shape of commonplaces. It was, however, an urgent matter to inquire what were the reasons of Bentham for denouncing judicial taxation as mischievous. Not certainly any vague notion, couched in figurative language, that you must not tax justice. Bentham's idea was that all litigation, or all but a very little, was entirely the fault of Government, and therefore he naturally objected that Government, which caused litigation, should profit by it. Bentham believed that litigation was owing to the complexity of law, and that this litigation might be almost entirely removed by legislation adapted to true principles. He thought that litigation, and therefore the expense of litigation, might be reduced to a minimum if it were not for the blindness, or the stupidity, or the cupidity of legislatures in not simplifying the laws. Mr. Maine would quote the panacea expressly prescribed by Bentham for the all but complete suppression of fees and costs: 'An all-comprehensive code of substantive law, having for its end in view the greatest happiness of the greatest number, each part of it present to the minds of all persons on whom conformity to its enactments, its attainment

of its end, depends, and an all-comprehensive code of adjective law, otherwise called a code of procedure, having for its end the giving, to the utmost possible amount, execution and effect to the enactments of the substantive code.' The passage was quoted from the *Principles of Judicial Procedure* as a statement of Bentham's expedient for preventing judicial taxation, and accordingly he argued with perfect logic that if costs and fees were inevitable, it was the Government and not the litigant that ought to pay them.

Now, without entering into the question of the truth of these views, had they any application whatever to India? The simple fact was that the people of India objected to having their laws and institutions simplified,[1] and resented such interference as a breach of the conditions on which the country was governed. There was an excellent illustration in the Indian Succession Act, the only chapter of that code of substantive law contemplated by Bentham which was at present in force in India. As it had been passed by this Council in almost the same form as it had been received from the Indian Law Commissioners, Mr. Maine might describe it without vanity as a most excellent and equitable piece of legislation. But the first admission that had to be made by the Indian Law Commissioners, by the Home Government, and by themselves, was that it could not possibly be extended to the intestate successions of Hindús, Muhammadans, and Buddhists, or, in other words, to the great mass of the population. They were told that it was as much as the empire was worth to impose an uniform law of intestate succession on the country; and so inveterate had become the conviction that each sect of the country was entitled to its own law of succession, that Mr. Maine would be surprised if, when the measure for extending the Succession Act to the Straits' Settlement came on for discussion, it was not contended that every division of that heterogeneous community was entitled to its own law, and that even the Sandwich Islander had a right to have his law of inheritance administered by the Courts. Now, it had been cal-

[1] Mr. Maine here refers merely to the Native laws of inheritance and adoption, which are inextricably bound up with the Native religions. As to the laws of contract, trusts, easements, alluvion, partition, torts, etc., the Natives are strongly in favour of all practicable simplification.

culated that nine-tenths of the heavier litigation of England, that which came into the Court of Chancery, was occasioned by the English law of succession. But the Hindú law on the subject was at least as complex as the English, and it was mixed up with and dependent on the system of adoption, and the system of joint occupation of property during life. This was then a case in which the strong feeling of the people had compelled the Legislature to maintain a most complex system of law, and one most fruitful of litigation. Another most striking illustration of the Native feeling on the subject of simplifying had been furnished by some of the answers to a circular recently prepared by the Secretary,[1] and issued from the Home Department. This circular referred to the formalities of executing wills : it did not propose that the actual power of making a will should be either extended or diminished ; but it suggested that certain securities against fraud, such as signature and attestation, should accompany the execution of every will. From the more enlightened parts of India the answers were favourable, but from those sections of the country which required the most careful watching what was the reply ? It was remarkable that the Muhammadans of the North-Western Provinces made, in the most express language, every admission which Bentham would have required. They allowed that every sort of fraud resulted from the system of oral death-bed wills ; but they urged that it was an inference from the words of their Prophet that a man up to the last moment of his life might bequeath by word of mouth whatever property he might lawfully dispose of, and hence they resented as an outrage on their religious feelings the imposition of the formalities required by the Succession Act. The Hindús followed suit. They admitted that wills, oral or writtten, were no part of their religious system ; but they argued that they ought not to be placed in a worse position than the Muhammadans, and that they were entitled to as many prejudices as any Muhammadan. Hence they, too, objected to the simplification of the law. The truth appeared to be that the people of this country were not only wedded by custom and religious feeling to complex systems of law, but prided themselves on their usages in proportion to

[1] Mr. Whitley Stokes.

the complexity of those usages. If this were so, the foundation of Bentham's doctrine collapsed, and the doctrine itself had no application in India. The Legislature was estopped, by the conditions of our tenure of the country, from so simplifying the law as to render judicial taxation mischievous. Mr. Maine did not mean to imply that indefinite judicial taxation was legitimate in this country. All he argued was, that it was governed by the same principles as the levying of any other tax, and not by any special consideration of the mischievousness of judicial taxation.

On March 20, 1868, when Mr. Massey introduced a Bill for taxing professions, occupations, and trades, two of the members, Mr. J. I. Minchin and Mr. M. J. Shaw Stewart, took objections to the stamp fees with which it was proposed to charge petitions to executive officers and criminal courts. Mr. Maine thereupon remarked :

There were two classes of stamps with which his honourable friends appeared to have a special quarrel, and on which it was necessary to observe specially. Mr. Minchin objected to the stamp fee on petitions addressed to executive officers, and he had defined the Government of India as a despotism limited by the right of petition. Now, Mr. Maine really did not see that despotism had much to do with the question ; for he understood that these petitions had reference to private interests, as to which the old doctrine still held good that it did not matter half a crown to a man under what Government he lived. If, however, despotism must enter into the definition, the Government of India might be defined as a despotism limited by the incapacity of its officers to do more than a certain amount of work. The case which had been laid before the Government was that its executive officers were inundated with multitudes of petitions on foolish or trivial subjects, and they found themselves placed in the alternative, either of not reading the petitions or of placing some check on their presentation. The check devised was the levy of a small fee, which was in effect an addition to the price of the paper on which the petition was tendered. In this way the petitioner was forced to think before he wrote. Mr. Maine's own very limited experience certainly led him to think that there was common-sense in the expedient. Nobody charged with the legislative business of the Government of India would

ever fail to receive a crowd of letters containing suggestions, remonstrances, and objections relating to legislation generally or to Bills before the Council. Mr. Maine's own conviction was that nothing saved him from a perfectly overwhelming correspondence except the practice of the Natives of India, not simply to pay the postage on letters which they thought important, but to register them also, in order that they might certainly arrive at their destination. It was to be recollected that no price was put on oral complaints, and the complainant might still get audience of the officer. If the fee on petitions pressed too harshly—and this was a point to be investigated like the others—Mr. Maine was of opinion that the appropriate remedy would be to increase the facilities for approach to the executive functionary of the Government.

Now then, as to the stamp on complaints addressed to the criminal courts, which appeared to excite so much indignation in the Bombay Presidency and in the mind of his honourable friend Mr. Shaw Stewart. If ever there was a subject on which it was idle to repeat the ordinary commonplaces as to the denial of justice (they might not be commonplaces as Mr. Minchin had put them, but they were the common and current opinions), it was this. Mr. Maine must recall to the Council the extraordinary and appalling fact which had been brought home to the Stamp Committee by its investigations in 1866. Bengal Proper was the great litigating province in British India, and it was established that the result of taking the stamp off complaints in criminal cases was, that of 177,000 persons charged with offences in the single year 1864, 105,000 were never brought to trial, and more than half the rest were acquitted. Mr. Justice Hobhouse[1] had explained to the Council last year how these 105,000 cases never came to be tried. There was a quarrel in the village. An angry villager went to the court, paid one of the persons hanging about there a few pice to write a complaint, in which the name of his bitterest enemy was put down as defendant to a criminal charge, while the persons whom he hated with an only moderate hatred were named as witnesses. The defendant and the witnesses were there-

[1] Now Sir Charles Hobhouse, Bart.

upon summoned by the police; the complainant never appeared, and the charge was dismissed. But the defendant and the witnesses went home, having lost two or three days' work, and labouring for life under the discredit—which it was honourable to the Bengálís to consider a discredit—of having been brought up before the court on a criminal accusation. It was true that things did not seem to be quite so bad in other parts of India; but, after all, the great difference between the Bengálís and the natives of the rest of India was that they were more quick-witted, and Mr. Maine suspected that the secret of the difference was that it had not been discovered in the other provinces to what use the courts might be put. But the fact was established that in the province in which resort to the courts was most diffused, out of every hundred criminal charges made, seventy-five were false and fifty were malicious. The courts in fact were, in one great province actually, and in others potentially, an engine of cruel oppression. Now let the Council suppose that, apart from any financial emergency, the question was before it how to deal with the state of things he had described. It was the undoubted duty of the Government to keep courts open for the redress of wrong. But it was also the duty of Government to shield its subjects from the deep injury of false and malicious accusation. If the two duties conflicted (and Mr. Maine trusted that this was a practical, as much as it was a theoretical, paradox), he was not sure that it would not be better to close the courts, and thus stop the utter demoralisation of which they were the source. But if a less extreme course were desirable, it might occur to a legislator fresh from Europe to adopt what practically was the French system, and to collect the materials of accusation entirely from the inquiries of our own officers. If, however, the natives of India were to be taken as they were, and if the police could not be used for this purpose, Mr. Maine was not sure that the system of the Stamp Act of 1867 was not as reasonable a one as could be devised. If a man came to the court and merely wished to deposit a complaint in writing against his neighbour, a small fee was demanded from him as a guarantee of his seriousness. If, however, he was too poor to

pay it, he went before the magistrate and stated his grievance orally, and it was in the discretion of the magistrate whether, in reducing the complaint to writing, he would demand the fee or not. The expedient might not be a good one; but it was for those who objected to it to suggest a better. In Mr. Maine's opinion it would be discreditable to the Council to abolish the stamp without at the same time finding a remedy for this monstrous evil of wholesale false accusation.

His honourable friend Mr. Minchin had concluded by appealing to His Excellency for untaxed justice to the poor The proposition implied in the appeal was one which had commended itself to persons who, without disparagement to Mr. Minchin, he might call more eminent than his honourable friend. At a more convenient time, Mr. Maine would endeavour to point out what, in his judgment, was the fallacy that underlay all arguments against judicial taxation. In his own opinion, the taxes improperly called taxes on justice were fully as justifiable as any other taxes; but on the same conditions, namely, that they should not be either excessive or oppressive. He knew of no country in which there was no judicial taxation, and he was certain that the experience of every man in the room would bear him out in the assertion that if the theories of his honourable friends were carried to their full practical consequences, and if the natives of India, without paying an anna and at the expense of Government, were allowed to put the machinery of the civil courts in motion against everybody they pleased, and in vindication of any alleged right they pleased, the only class of persons in the country to whom life would be tolerable would be those who had no property whatever in respect of which they could be sued. Thus, the excess of civilised justice would produce precisely the same results as the extremes of anarchy and barbarism.

On September 10, 1869, when the late Mr. F. R. Cockerell moved for leave to introduce a Bill to provide for the better regulation of court fees, Mr. Maine said that

he had been desirous of explaining away two misapprehensions, one much more important than the other, which were disclosed by the papers which he and his honourable friend had examined. One of these was the mistaken idea

that the Government of India had ever started or encouraged the doctrine that the taxation of the administration of justice was a justifiable mode of recruiting the general finances of the empire. In order to dispose of that statement, it would be enough to refer to a paper furnished to Mr. Maine by the Secretary in the Financial Department. The figures could not be quite confidently interpreted on account of the system—which, Mr. Maine hoped, would be abolished—of lumping together the revenue derived from general or documentary stamps and that derived from judicial stamps, which were, in reality, court-fees. A conclusion which was roughly true might, however, be founded on the figures, and it appeared from them that the litigating part of the Indian community paid just about half the expense of the administration of justice, and this result was reached without debiting that administration with the cost of the revenue courts, which, of course, in many of their functions were just as much courts of justice as any others. The inference was that the part of the community which, in India, availed itself of the courts contributed less to their cost than the corresponding section of any civilised community, although the courts in this country were resorted to in many matters which elsewhere were settled by private adjustment. All the rest of the expense of the administration of justice was paid by the general body of tax-payers, for which the Government was trustee. The question, therefore, whether justice might be taxed for the general purposes of the State did not arise in India. Nor did the history of the scale of 1867 [1] bear out the doctrine he had been disclaiming. Mr. Cockerell had correctly stated that there had been many representations to the Government of India that the scale of 1862 [2] was too low, and capriciously arranged. These representations might not have been attended to but for the anxiety of the late Viceroy to carry into effect a measure which, in the farewell given to Lord Lawrence by the community of Calcutta, had been described by the Commander-in-Chief as one of his highest titles to the recollection of the people of India. Lord Lawrence

[1] The scale established by Act XXVI. of 1867.
[2] The scale established by Act X. of 1862.

had, very early in his career, formed the opinion that the greatest evils arose from the under-payment of the lower Mufassal judges, and of the officers of their courts, and he had much at heart the improvement of their position. The plans which he had been considering came to maturity in 1866; but, as His Excellency[1] would easily believe, the finances of the country were ill able to bear the additional burden. Accordingly, it was determined to institute an inquiry directed to ascertain whether, as the quality of the justice to be administered was to be so much improved, the suitors might not fairly be asked to contribute something more towards the cost of administering it. Every precaution was taken to secure a great weight of authority for the new scale. The Commission appointed by the Government included gentlemen of the highest judicial eminence both in the High and in the Mufassal Courts, and it was requested so to arrange its sittings as to be assisted by the additional members of Council who were just arriving in Calcutta. The scale of 1867 was the result of the labours of the Commission, and though, as Mr. Cockerell had put it, there might be some appearance of haste in passing the measure through the Council, this haste was, as his honourable friend had correctly stated, no more than was inevitable in the case of taxing Bills of this nature. There was nothing like precipitation in settling the basis of the measure. Mr. Cockerell was further right in saying that Lord Lawrence promised an inquiry into the working of the new scale, which some had questioned from the first, though these were mostly persons under the influence of *a priori* ideas. The present measure resulted from that inquiry. The statements and opinions placed before Government perhaps struck Mr. Maine as rather more contradictory and unsatisfactory than they appeared to his honourable friend; but still Mr. Maine had no doubt that the scale required reduction in some particulars. Such experiments as the Commission of 1867 had attempted were always, as he supposed, more or less leaps in the dark; and it certainly seemed as if the Commission had to some extent leapt too far. But assuredly the last thing which could be attributed to it, or to the Govern-

[1] Lord Mayo, then Viceroy of India and President of the Council.

ment, was a policy of taxing litigants, as a separate class, for the benefit of the general finances.

The other misapprehension to which Mr. Maine had referred was of very much less importance. It seemed to be supposed that he himself had at some time or other elaborately justified the policy of filling the Treasury by taxing litigants. He might be permitted to say that he had never done anything of the kind. What he really had done was to contend against the extreme theories—and His Excellency must have already learned that this was a country of extreme theories—of certain gentlemen who argued, if the logical consequences of their doctrines were to be accepted, that the litigant should contribute nothing towards the expenses of litigation. Some people seemed to suppose that governments ought to be like Oriental monarchs, who first appropriated the greatest part of the property of their subjects, and then, by way of compensation, sat in the gate and administered justice for nothing. Mr. Maine was not going to trouble the Council with any discussion of abstract doctrines; but, as in matters of this kind a grain or two of fact was worth a bushel of theory, he would call their attention to a fact immediately before their eyes which came home to them for a special reason. A late colleague of theirs, Bábu Prasanna Kumár Thákur, a most astute lawyer, left a will in which, for reasons entirely personal to himself and his family, he raised a series of the most difficult questions which could possibly perplex an Indian Court. He in fact attempted, for objects of his own, to see how far some of the most recondite feudal doctrines of English law could be made to apply to India. During the last few months, much of the time and a vast amount of the intellectual strength of the Calcutta High Court had been employed in construing this will.[1] But why on earth should the Government furnish for nothing a most costly machinery for the purpose of unravelling the perplexities of such a document? Or, to take the converse case, why should it supply judges gratuitously to construe perfectly stupid and ungrammatical wills? Or why should it pay for

[1] It afterwards went up to the Judicial Committee of the Privy Council. See the report, *Tagore* v. *Tagore*, Bengal Law Reports, 395.

the winding-up of an insolvent joint-stock company? The truth was that, though people were often involved in litigation through no fault of their own, yet a vast amount of litigation arose from complications of fact produced by the neglects of themselves or their predecessors in title, by unbusiness-like habits, by heedlessness, or by sheer folly. The true doctrine, Mr. Maine submitted, was that the litigants and the general tax-payers should each contribute something. Nobody denied that the litigants benefited by the courts, and nobody would deny that the rest of the community derived some advantage from the solution even of such questions as those raised by this Bengálí gentleman's will. What the proportion paid by each should be was a question, not of theory, but of experience, to be equitably settled by the Government as trustee for all, and it was due to the Commission of 1867 to say that they had furnished the Government with much valuable experience to work upon.

MURDEROUS OUTRAGES IN THE PANJÁB

MARCH 15, 1867.

A SUCCESSION of murderous outrages committed by so-called Gházís in certain districts of the Panjáb made it necessary to legislate, first, to provide a speedy mode of trying and punishing offences attributable to religious fanaticism, and, secondly, to render attempts at murder, made under the influence of fanaticism, punishable with death. Under the Indian Penal Code such attempts are punishable only with transportation.

Fanatics murdering or attempting to murder are punished on conviction either with death or transportation for life, and all their property is forfeited to Government, and the Commissioner of the Division, who as a rule tries these cases, may adjudge that in the case of any fanatic killed in committing any murderous outrage his property shall be forfeited and his body burnt. A Bill containing these provisions was accordingly introduced; and in the course of the debate thereon, Mr. Maine said that he

would move an amendment which was not of great importance, but which would afford him an opportunity of describing the character of the measure. It did not appear to have attracted much attention, but Mr. Maine hoped that whatever

opinion had been formed on it was not reflected in the only criticism he had read. It had been described in this criticism as an illustration of the extreme readiness of the Indian Government to license lawlessness. If the precisely opposite character had been attributed to it, and it had been called a signal example of the tenderness of this Government for law and legality, the description would have been more correct. Who were the persons to be tried under the special procedure? They were persons who, under the influence of frenzy, but of perfectly controllable frenzy, either because they had made a vow, or supposed themselves to be discharging a duty, murdered others whom they had never seen before, without the smallest shadow of provocation. These murderers appeared not even to deserve that semblance of respect which was sometimes given great crime. An honourable friend of his, who had served in the Panjáb, had repeated to Mr. Maine a conversation with an assassin who had been convicted of one of these fanatical outrages. He was asked why, calling himself a man, he had stabbed his victim in the back, and why he had not given him a chance of resistance. The answer was that that would never have done, because in that case he might have been killed himself, whereas his object was to kill and not to be killed. As, however, he had succeeded, he was perfectly willing that the Government should hang him. Mr. Maine would take upon himself to say that, if this sort of outrage had been committed in the most civilised portions of the world—let us say in the cities of London or Paris—and particularly if there were any reason to believe that the act was done upon a system, the murderer would have run much risk of being torn in pieces by the mob. If it had been perpetrated in places distantly resembling the Indus frontier—as, for example, the more westerly States of America—the life of the assassin would not be worth five minutes' purchase. If it had been committed in any Asiatic country—and he would not take a country under an Asiatic Government, but such a government as that of the Dutch in Java, or of the English in Borneo—if it were the case (to take the nearest counterpart) of a Malay running amok—the murderer would have been shot down by the first man with firearms in his hand who met

him. These were the persons whom, under the present measure, it was proposed to try by a procedure differing in no essential respect from that of the ordinary law, except in the excision of the appeal. The appeal was perfectly useless, inasmuch as the evidence was always of the clearest character, and, indeed, the murderer himself always took care to supply the clearest evidence, for he never tried to escape, and, as in the case put by Mr. Maine, was perfectly prepared to be hanged. It was quite wonderful that people should not be able to throw themselves sufficiently out of surrounding circumstances to see that the measure was a striking example of the desire of the Indian Government to impose legal order on its officers under the most trying conditions. As to the discussion which had taken place last week, it was to be observed that it had turned entirely on words. In the papers sent up from the Panjáb Government, the simple term *Gházís* was used for these assassins. If it had been employed, there would never have been a moment's doubt as to the class intended, and the word used would have been as clear as the term *Moplah* used in the series of Acts which were passed to put down analogous crimes in Malabar.[1] But this word *Ghází* had been discarded for a reason which Mr. Maine would venture to call not discreditable to that Council. While it was well understood that all respectable Muhammadan subjects of Her Majesty disclaimed sympathy with these murderers, it was felt that the word *Ghází* had not yet quite lost its honorific sense in their religious language, and that its employment as the designation of a class of criminals might be deemed offensive. The sole difficulty, therefore, had been created by the necessity of finding an equivalent for this term *Ghází*. The Select Committee had substituted the expression 'political or religious fanatic, who murdered persons whose religion differed from that of the offender.' The Lieutenant Governor objected to the last part of the definition on the ground that it was undesirable, where it could possibly be avoided, to base legislation on differences of religious opinion. Mr. Maine had himself objected to the phrase 'political fanatic,' partly because he was not sure what it

[1] Acts XXIII. of 1854, V. of 1856, and XX. of 1859. 'Moplah' (rectius, Máppilla), lit. the son (*pilla*) of his mother (*má*), as sprung from the intercourse of foreign colonists, who were persons unknown, with Malabar women.

meant, and partly because, if he was, he hoped all the Council were political fanatics. He would have himself preferred to retain the word 'religious,' but now that its omission had been carried, Mr. Maine did not think that the application of the Bill was altered. The primary and etymological meaning of 'fanatic' was religious fanatic, and though the word was used in other senses—as, for example, in such expressions as fanatic in politics, or fanatic in art—Mr. Maine held that the employment was abusive, and only amounted to a metaphorical or analogical extension of the meaning of the word. Hence Mr. Maine thought that there must be some ingredient of religion in the frenzy of an assassin who was brought under this measure. As regarded his amendment, its object was this. In his opinion the appeal was quite idle, only necessitating the carriage of a mass of papers over some hundreds of miles of impracticable country, and thus causing a delay which was fatal to the prompt example which it was necessary to make for the sake of deterring future crime, and of affording security for life and limb to the officers employed on the border. But though the appeal would have been a useless addition to the careful procedure of this Bill, the judgment of the Chief Court in deciding the appeal might not have been without value. The guidance which such judgment might have given to officers on the frontier, Mr. Maine proposed to give by circular orders.

Mr. Maine then moved the following amendment :—

'With the previous consent of the said Lieutenant Governor, but not otherwise, the said Chief Court may from time to time make and issue circular orders for the guidance of officers in cases under this Act, provided that such orders are consistent with the provisions herein contained. All such orders shall be published in the official *Gazette*, and shall be obeyed by the officers aforesaid.'

The amendment was carried, and the Bill became law as Act XXIII. of 1867, a temporary measure, which expired in 1877, but was revived and amended by Act IX. of 1877.

INDIAN MUNICIPALITIES

MARCH 13, 1868.

THE following speech was delivered in the course of the debate on a Bill which became law as Act VI. of 1868, *to make better provision for the appointment of municipal committees in the North-Western Provinces, and for other purposes.* Mr. Shaw Stewart having proposed an amendment which would, in two years after appointing a municipal committee, have made the system of nominating the commissioners entirely one of election, Mr. Maine observed that

he was not in India when the Select Committee came to a decision adverse to the principle of his honourable friend's amendments. He was therefore desirous to state the reasons which had led him, independently, to the same conclusions as the Committee. When the Bill was originally submitted to the Council, there appeared to have been a certain lack of information; but there had subsequently come a memorandum from the North-Western Provinces, which Mr. Maine did not think had been mis-described by his honourable friend Mr. Brandreth as excellent. In that memorandum there was used a term which had become of late politically famous—'educate.' It was said to be the object of the Lieutenant Governor of the North-Western Provinces to educate the Natives of that part of India for municipal institutions. The view did not seem to differ from that which appeared to have been recently expressed in that room by His Excellency the Governor General. The Natives of India cared little antecedently for the objects sought to be obtained by municipal institutions; but after being for a time accustomed to cleanliness and decency, it was alleged that they began to appreciate them, and the improvement in the public health which was their result, and that in the end they would even co-operate in giving effect to sanitary measures. Now, the true effect of the amendments proposed by his honourable friend Mr. Shaw Stewart was to fix an arbitrary period within which this education was to be completed. As Mr. Maine read the amendments, they proceeded on the assumption that all municipalities in the North-West would in

two years at most be prepared for municipal institutions, and beyond this, that the Municipal Committees would be prepared to lay the foundations for a system of popular self-government. Now, speaking as an English Member of Council, he must say that it was surprising that the Natives of India should be fit for municipal government at all. While municipal institutions on the European model were here of recent date, they had had in Europe an almost unbroken history of two thousand years, and yet those who most recognised their advantages could not help confessing that they were compensated by many disadvantages and drawbacks. Sometimes municipalities were corrupt: sometimes they were guilty of petty tyranny: sometimes they erred on the side of extravagance: sometimes on that of parsimony. It was impossible not to see that, even in England, where there was a disposition to give them the fairest trial, the Acts called the Local Government Acts, which had given extension to the area of self-government on one side, had greatly controlled and limited it on the other. As, then, all the temptations and misleading influences which produced the occasional miscarriage of municipal institutions in England operated with far greater force in this country, it was matter of surprise that those institutions could be established here with useful result. As, however, gentlemen of great local experience assured Mr. Maine that it was possible here to have municipal institutions with no more than a reasonable amount of corruption and mismanagement, he of course bowed to their opinion. But if it was surprising that municipal institutions should flourish at all in this country, still more wonderful was it that they should in any case be based on a system of popular representation. Surely this, at all events, might be asserted on the strength of English experience—that it was a most difficult, if not an insoluble problem, to create a constituency or set of constituencies in which one class should not have the power to oppress the others, or to protect itself at their expense. Considering how Native society was divided into castes, and sects, and religions, and races, it was surprising that there should be practicable, anywhere, a system of municipal election at once fair and free. As, however, Mr. Maine found

such passages as the following in the memorandum from the North-West, he was bound to attach weight to them :—

'Towns like Bolundshuhur, Meerut, Banda, Allahabad, and others have been divided into wards, each returning its member or members annually, and the qualifications of membership and of the electoral franchise have been defined, and in every sense the Committee is a representative one, freely selected.'

Whether the *s* at the beginning of 'selected' was a clerical error, or a stroke of irony, Mr. Maine could not say; but assuming that the meaning was that there was free election in these North-Western cities, he could only believe it, though his faith was feeble. When, however, his honourable friend Mr. Shaw Stewart came and told them that there was no Native city in India, however divided and however dirty, in which the materials for founding within two years a system of popular election did not exist, Mr. Maine must say he began to doubt. His honourable friend had, in fact, concealed from himself the magnitude of his proposal by throwing off the burden of solving the problem on other persons. Clause 1 of section 7 of the amendments ran as follows :—

'As soon as practicable after their appointment, the Committee shall prepare and submit, for the sanction of the Lieutenant Governor, rules for the biennial elections of Municipal Commissioners in the place of those who retire in rotation, and such rules, when sanctioned by the Lieutenant Governor, shall remain in force until altered or amended by the Municipal Commissioners with the sanction aforesaid.'

What was the exact system which his honourable friend contemplated did not appear clear to Mr. Maine. His honourable friend's language left it doubtful whether he had in view a system of universal suffrage, or a system of rotten boroughs. But at all events it was to be taken for granted that, in all Indian cities, there was a number of intelligent Natives who were capable of solving the problem which had perplexed the British Parliament for thirty years. It was true that, under clause 4, the Lieutenant Governor might reject these rules. But let the Council see what might occur. Mr. Maine knew little personally of the North-West; but he did know that, in some of the North-Western cities, Hindús

and Muhammadans were mixed together, and it was all that the administrative skill and vigour of English officials could do to keep peace between them. Now, suppose the Lieutenant Governor had appointed originally, under the provisions of his honourable friend's amendments, a committee of respectable gentlemen who were all or mostly Hindús, and suppose that they had submitted a set of rules which would have the effect of entirely excluding the Muhammadans. The Lieutenant Governor would reject these, and would record his reasons for so doing. But they might be perpetually re-submitted by the Committee, which would soon learn its advantage. Surely it would be seen that this perpetual submission and rejection might cause a chronic irritation and fret which would constitute a grave political danger. What the opinions of the late Lieutenant Governor of the North-West were (and they were shared by the present Lieutenant Governor), would be seen by the passage which he would quote :—

'There are towns in which the system of a popular election would not conduce to good government. Either the number of citizens who, by their intelligence and public spirit, are capable of serving is so limited that there is little room for selection if a working committee is to be had, or those whose influence must be respected would not act with persons chosen indifferently. Especially is it necessary on the first introduction of a system to conciliate those who are the leaders of society, and to use only the material which, by education and natural ability, is most fitted to perform the duties of the post. It is only to the care in attending to this that, in not a few instances, the success in the working of the Act is due. Very recently, when the Act was introduced into the important town of Benares, the Lieutenant Governor was anxious that at least a portion of the committee should be elected by the citizens, and suggested this to the committee of the leading residents appointed to draw up the rules, but the proposal did not meet with a favourable reception. Those Native gentlemen who were unquestionably the most public-spirited and intelligent in that large town thought that it would be unwise to introduce such a system until the Act had been in operation for some time, and its objects and the duties of the committee were better understood. The Lieutenant Governor, convinced that they were themselves the best judges on this point, consented to the postponement. Ultimately, even if the present Act remains in force, the rules now in force there will be popularised as they have been else-

where. Had the Act rigidly prescribed that only by election shall the committee be chosen, it is not rash to assert that the result would often have been failure, not success. It is the interest of Government that the system shall work smoothly. There is no desire to force improvements rapidly on the people against their will. Undue haste would defeat the wishes of the Government, but as the people understand and appreciate the system of municipal government, and are fitted intelligently to take their part in it, their privileges have been and will be enlarged. It is not to be expected that the citizens can at one bound pass from the position of utter powerlessness to the enjoyment of the fullest freedom as commissioners or electors. Their powers must be increased gradually. By exercising a little, they become fitted to exercise larger powers, and the Government, assured of their fitness, will not be slow to enlarge them.'

Was, then, the Council going to force on the Lieutenant Governor of the North-Western Provinces a system of which he did not approve? This was a particularly strong case. The only members of the select committee who had differed from its conclusions were his honourable friends Mr. Shaw Stewart and Mr. Minchin, who represented (if it was proper to use the word) Bombay and Madras. Mr. Maine did not in the least doubt that, in alleging the general practicability of a system of popular election, they stated no more than their personal experience in the Southern and Western Presidencies warranted. Now, when this Council was enacting a law for all India, it was sometimes inevitable that they should apply to parts of the country principles which had been more thoroughly tested in other provinces. But this Bill would affect only the North-West. The Council was in fact sitting as the local legislature of the North-Western Provinces. If the theory of the Indian Councils Act were fully carried out, there would be a local Council for those Provinces, within whose strict competence the present Bill would have fallen. It was only through an accident that the Supreme Council assumed jurisdiction over the Bill. Would, then, the Council make itself the instrument or agency for forcing on the North-West the results of Madras and Bombay experience? If they were sitting at Agra or Allahabad, and the Lieutenant Governor of the North-West, occupying the chair now occupied by his Honour the Lieutenant Governor of Bengal, were

to say (as in effect they knew he would say) that the scheme of his honourable friend was dangerous or impracticable, Mr. Maine felt sure that it would be at once pronounced inadmissible.

PANJÁB TENANCY

OCTOBER 19, 1868.

THE following important speech was delivered during the consideration of the final report of the Select Committee on a Bill then in charge of Sir Richard Temple, to define and amend the law relating to the tenancy of land in the Panjáb, which became law as Act XXVIII. of 1868. The necessity for legislation arose from the great discrepancy of the views of the status of the cultivator entertained by different sets of Panjábí settlement-officers, and from a decision of the Chief Court of the province condemning the procedure adopted by some of these officers. The Act was somewhat in the nature of a compromise; but it remained in force for nineteen years, when it was superseded by Act XVI. of 1887, the present law on the subject.[1]

Sir, there is much in the Bill of my honourable friend on which it will be safe for one who has not passed the greatest part of his life in India to abstain from pronouncing positively; but some questions of principle are raised by it on which I may be entitled to have an opinion. The views which I have formed on them (which happen for the moment not to be popular views) I am the more anxious to state because, though the subject-matter of the measure has undergone much public discussion, I do not think justice has been done to the side of the questions involved to which I am compelled to incline. Before, however, I come to the merits of the Bill, it is perhaps proper I should say something on a point which was much discussed when the Bill, then in Mr. Brandreth's charge, came before your Excellency's Council. I was not in India at the time; but I see that several Members of the Legislature expressed doubts whether any legislation at all was required, and whether the law, as applied by the settlement officers and civil courts of the Panjáb, should not be suffered to take its course. The facts of the case are now much more clearly known. We have not before us the statistics of the recent settlement for the

[1] See as to the two Acts, Mr. Baden-Powell's *Land-Systems of British India*, vol. ii., pp. 709-721.

whole province, but we have them for one division. It appears that in the single division of Amritsar 60,000 heads of households were recorded at the first settlement of the Panjáb as entitled to beneficial rights of occupancy. At the recent settlement, 46,000 of these cultivators have been degraded to the status of tenants-at-will. If the same proportions be maintained for the whole province, these numbers denote some hundreds of thousands. It would appear, however, from a minute of the Chief Court of the Panjáb, that, though the settlement officers employed the settlement regulation of 1822[1] to produce these formidable results, they did not think fit to follow the prescribed procedure, but have adopted a procedure of their own, unknown to the law. The Chief Court states accordingly that all the settlement operations have effected is a 'superior description of registration.' But that is not all. It seems that the settlement-officers, from compassion or compunction, did not in all cases degrade the occupancy-tenant at once to a tenancy-at-will. They allowed him a period of grace, during which he was to retain his rights of occupancy. The Chief Court has decided that they had no power to do anything of the kind, and that in such cases the higher status must continue indefinitely. Sir, I observe with regret that, during the sittings of the gentlemen who recently assembled at Marrí to consider the amended Bill, an attempt was made to get some words introduced into it reflecting on this decision of the Chief Court. I do not suppose that anything I may say can add authority to the Court's opinion, but still I am bound to state that it appears to me—and what is more important, I believe it appears to your Excellency—that the Chief Court was entirely and obviously in the right, and that the functions of a settlement officer are confined to declaring the class of tenure to which the holding of each cultivator belongs. This decision of the Chief Court, however, in Amritsar alone, affects no less than 22,000 cases. In one division, there have been 46,000 rulings on rights of land, of which 22,000 are bad in law. We are threatened with an agrarian revolution, to be immediately followed by an agrarian counter-revolution. In such a state of things, it is probably superfluous for me to argue on the

[1] The Bengal Regulation VII. of 1822.

necessity for legislation, and indeed I greatly lament that the course of circumstances has prevented your Excellency's Government from stepping in earlier, and with a high hand forcing a compromise on the official disputants in the Panjáb.

And now, sir, as to the Bill before the Council. I do not mean to oppose it. Indeed, as a member of the committee I have joined unreservedly in the recommendation that it be passed. But the chief ground on which I support it is that affairs in the Panjáb have come to such a pass that no arrangement of the matters in dispute is now prudent or politic, except one in the nature of a compromise. The controversy between the officials has extended to the Natives: the fears of one class and the expectations of another have been roused; and it thus becomes imperative on the Government of India to avert great political evils by taking a decided course and effecting a settlement intermediate between extreme views. I further refrain from placing any impediment in the way of the Bill, because your Excellency, who certainly cannot be accused of any fanatical dislike of tenant-right, does not think that the measure as now settled by the Select Committee will inflict intolerable hardship on the large class it will affect. But, sir, I am bound to say that but for this feeling on your Excellency's part, and but for my conviction that nothing but a compromise of some sort is now admissible, I should have the gravest doubts of the wisdom, fairness, and expediency of the Bill. I should doubt whether it did not go much too far in countenancing proceedings which seem to me to exhibit characteristics rarely found together in India, and to combine an attack on tenant-right with an attack on the stability of the rights of property. Let me say, however, that I do not think that, properly speaking, the Bill raises the question of the expediency of tenant-right. I can quite understand two opinions being held as to the well-known rule of Act X. of 1859, under which there is a perpetual creation of new tenant-rights. I can understand two opinions on the question of tenant-right as it presents itself in Ireland, and as it presented itself three years since in Oudh. But when tenant-right has once existed for a definite period of years, when it has been protected by Government and law, and when it has become vested in spe-

cific individuals, it appears to me just as much deserving of respect as any other form of property. All question of its expediency disappears, and the principles of justice and statesmanship no more admit of its violent destruction than they do of the confiscation of copyholds.

Sir, in order to explain the grounds on which I should dispute the equity and common fairness of this Bill, if I thought the question open to any arrangement except one of the sort which it proposes, I must repeat those amazing figures which I read to the Council a few moments ago. At the first settlement of the Panjáb, 60,000 heads of agricultural households were in the single division of Amritsar recorded as having beneficial rights of occupancy in their holdings. At the present settlement, 46,000 of these occupancy-tenants have been degraded to the position of tenants-at-will, liable to eviction and rack-rent. Sir, the exact economical position of the ryot whose tenure is one of occupancy I take to be this. He cannot be evicted except on certain conditions, and the profits of the cultivation of the soil (independently of the share of those profits taken by the Government as revenue, and independently of the portion which represents the cost of tillage, and of the cultivators' subsistence, and the interest of whatever capital he may have embarked) are divided under varying rules of law between the occupancy-tenant and the landlord, instead of going wholly to the landlord, as in the case of a tenant-at-will. This being so, I have always held the opinion attributed to me at a recent sitting of this Council by my honourable friend Mr. Strachey, that, in strictness of language, the occupancy-tenant is a co-proprietor with the landlord. Rights over land or any valuable commodity are either rights arising out of contract or proprietary rights. This distribution of rights is considered by the best jurists as exhaustive; if, then, the occupancy-ryot does not hold (and it is clear he does not hold) under contract, it follows that he has some sort of right of property in the land. There has, therefore, been in the district of Amritsar an attempt at a clear confiscation of property to the extent indicated by 46,000 heads of agricultural households. These 46,000 persons are, it is proposed, to be placed in the same condition as if they had merely con-

tracted for the use of the land. Not only that. A contract may be highly beneficial; but the contract under which these ex-proprietors are to hold, either at once or ultimately, is the least beneficial of all contracts connected with land—a tenancy-at-will and at a rack-rent. If the settlement officers of the Panjáb are allowed to have their way—and in order to have their way they have left no stone unturned which an Indian functionary can move—these 46,000 households will be completely dependent on the will and pleasure of others for the liberty of remaining on the land, and will pay for that liberty exactly what those others choose to demand. And, taking the whole province, there must be hundreds of thousands of cultivators whose proprietary status has been similarly degraded.

Now let me trace the history of those advantages of tenure of which it is proposed to deprive these unhappy persons. First, what has been the duration of their beneficial enjoyment? Fifteen years is a fair average time to assume for the duration of the first settlement, though in some parts it has lasted considerably longer. It is conceded—and this is the very ground of objection to the first settlement—that the status then recorded corresponded with the actual facts as they existed for at least twelve years preceding. It is, therefore, a beneficial enjoyment and possession of at least a quarter of a century, and probably of a far longer period, which it is now sought to disturb. But that is not all. Sir, I say that for the last fifteen years these rights have been enjoyed under a distinct protection and guarantee of permanency by the British Government. I commend to the attentive consideration of the Council the earlier part of the valuable minute of the Chief Court. It is there shown that at the first settlement of the Panjáb the officers employed did not merely, as in older Indian settlements, construct a record which was only a *primâ facie* description of the rights therein described. The Panjáb officers were invested with judicial powers, and the civil courts were carefully excluded from interference with their decisions, which when given on merits became the decisions of Judges. Of course I do not mean to say that they adjudicated in every case. No court of justice ever adjudicates in more than the minutest fraction of the cases really, though indirectly, affected

by its jurisdiction. But it is clear that everybody, landlord or tenant, had an opportunity of coming forward to assert his rights in litigious form, and had power to appeal from decisions which he thought inequitable, and every decision of the settlement courts must have indirectly disposed of thousands of cases not actually brought before them. I can scarcely conceive any stronger guarantee given to these rights. A parliamentary title to property is necessarily somewhat arbitrary; but when a Government sets its courts of justice in motion for the affirmation of rights, bringing them to the very doors of claimants and opponents, it gives a moral guarantee of the highest order. These tenants, therefore, sir, have been in possession for at least twenty-seven years, and for fifteen years of that time have enjoyed their rights under the protection, not only of the British Government, but of British courts of justice. Let me now ask whether they are an idle and thriftless class, whom it is expedient to improve off the face of the earth. Sir, the evidence to the contrary which has been laid before me is truly astonishing. I have been told of parts of the Panjáb which were little better than a wilderness before annexation, and which now bloom like a garden, mainly through the industry of these tenants. I have heard of villages voluntarily paying more for the mere rent of irrigation-water than the whole amount of revenue which, at the time of annexation, it was thought fair to demand from them on the part of the Government. Sir, I do not adduce the proved laboriousness of these cultivators simply by way of appeal to compassion. It constitutes my main answer to the proposition so often occurring in these papers that 'it was the British Government which introduced rights of occupancy into the Panjáb.' I do not believe the statement, and I see that the most violent partisans of the theory have now been compelled to relinquish it, for after the most stringent revision of the Amritsar settlement 15,000 occupancy-tenants remain on the record, which is a conclusive admission of the existence of the tenure before the conquest. But suppose the statement to be true. Why should not the British Government, under the peculiar circumstances of the Panjáb, establish rights of occupancy in the tenants whom it found in the province at annexation? Who

is it that has created in the Panjáb the rent of land, and its value for sale or letting, which were practically unknown there under Native rule? It is partly the British Government by the peace and security which it has established—partly the cultivators by their industry. Why should the British Government not give some degree of protection to one large section of the class which, jointly with that Government, has produced all this wonderful prosperity? Why should it, on any principle of justice, be bound to place these tenant-cultivators suddenly at the mercy of anybody who can make a claim to those faint, vague, and shifting proprietary rights which by general admission alone existed before the annexation?

Sir, the proposal deliberately made to us by one numerous and energetic section of the Panjáb officials is to confiscate, either immediately or after a short interval, the beneficial rights of hundreds of thousands of households, guaranteed as I have described, vested in the class I have described, and gained at the expense of nobody. But what are we to say of derivative rights which in fifteen or twenty years have probably flowed from the original rights in the course of the ordinary transactions of life? As there has always been a doubt whether occupancy-tenures were alienable, they have probably not been parted with in any number, but money-lending is active in every corner of India, and undoubtedly these tenures have been the security, direct or indirect, for considerable advances of money. They may not have been expressly mortgaged; but I find from the papers of the Orissa Famine Commissioners that even in the most difficult times an occupancy-tenant can obtain an advance when a tenant-at-will can get none. What is to become of the security for such advances? It is apparently to be destroyed, together with the original rights.

Sir, I am bound to say—remembering always that I speak from an English lawyer's point of view, and subject to the reservation implied in my comparative ignorance of the necessary conditions of administration—I am bound to say that, when these proposals first became known to me, they struck me as really monstrous. Yet things *primâ facie* monstrous may turn out simple and natural, but we may at least expect

that a strong defence will be made for them. What defence is made here? The chief, it may be said the only, reason assigned for such proposals is that mistakes were made at the first settlement, and that cultivators were recorded as having a right of occupancy to whom the custom of the country did not attribute any such right. It will be inferred from what I have said that I decline to regard this as in any respect an answer to the tenants' claim. The true question is whether the title of the occupancy-ryots is not of such a character that it ought to prevail, even though it began in mistake—nay, even though it began, like many of the Taluqdárí tenures of Oudh, in simple violence. I consider, therefore, the allegation that mistakes were made as raising an immaterial issue. But as many estimable persons do seem to attach some degree of importance to the assertion, I may be permitted to inquire briefly on what foundation it rests. And here, sir, let me say it was a piece of great good fortune for this Council that my honourable friend Sir R. Temple joined us at the particular juncture in the history of this measure at which he took his seat. The impugners of the accuracy of the first settlement were very clamorous and positive; its defenders gave, it seemed to me, but an uncertain sound. But my honourable friend, who had an intimate connection with this settlement—which, I believe, most of its present critics know only by tradition—who in the Central Provinces has had proceeding under his eye a settlement conducted on precisely the same principles, was able to assure us that the imputation of carelessness or empirical precipitation was absolutely groundless, and that as much pains were taken as with any other settlement of revenue. Your Excellency is further aware that since it became known in England that these charges were being made, the Government has received letters from gentlemen who were engaged in the settlement in high positions, and who indignantly repudiate the imputations directed against their carefulness and sagacity. I have read the papers most diligently, and I find the only error worth mentioning which is charged against the original settlement officers is that they took the state of the facts existing during the twelve years previous to annexation as proof of the state of the rights. Now, sir, with a view to as-

certaining in what degree the settlement officers were blamable for taking this course, permit me to read a passage from a minute of the present Lieutenant Governor of the Panjáb,[1] who, it must be recollected, is a very high authority on opinions and ideas in purely Native states of society :—'The state of things,' he says, 'existing in the Panjáb for a long series of years preceding annexation was such as almost to extinguish proprietary rights in land, or at all events to deprive them of mostly all their value. The people in consequence possessed very indistinct ideas in regard to those rights, so that the best security for a correct ascertainment of the rights and relations of the several classes connected with the land was wanting.' Other authorities who have joined in this controversy have made the same admission even more strongly, so much so that it may almost be inferred from their language that, under Sikh rule, there was no such thing as eviction, and no such thing as the rent of land. Nor is this last statement as incredible as it may seem, for it may well be that the Sikh Government took so much from the cultivator in the form of revenue, that nothing, or next to nothing, was left to him but the means of subsistence and cultivation, and consequently there was nothing, or next to nothing, which could go to the landlord in the form of rent. But what was the problem before the first settlement officers? To discover whether tenants were occupancy-tenants or tenants-at-will—whether they could be evicted, and their rent enhanced at pleasure—and this discovery had to be made in reference to a state of society which included neither eviction nor rent. Really, sir, the customary mode of doing that which was never done—the customary mode of dividing the non-existent—strike one as belonging to that class of questions on which it is best to decline giving a confident opinion. Why then, when the conditions of inquiry were these, why should the settlement officers be condemned for preferring one of the best-established principles of jurisprudence to an investigation of the 'very indistinct ideas' described by Sir D. Macleod. There is, in a memorandum recently sent up, a dictum of the settlement commissioner that 'the recognition of periods as tests of rights is the very mis-

[1] The late Sir Donald Macleod.

chief.' Well, sir, the recognition of a period of time as the test of a right may in the Panjáb be called a mischief, but it is known to jurists as a prescription; and not only are prescriptions common in all systems of jurisprudence, but it so happens that the free use of prescriptions has been selected by jurists as the criterion for distinguishing good and civilised systems of law from those that are bad and barbarous. And the reason is notorious. The accumulated common-sense of ages has shown that, even in societies which have very distinct ideas as to property, inquiries into rights which are unfrequently and intermittently exercised are, if carried far back, as nearly as possible worthless.

But, sir, assuming that the adoption of the twelve-year rule led to the recording of some rights which would not have been recorded if a different mode of investigation had been followed, let us see whether the officers engaged in the recent settlement had any advantage in prosecuting their inquiries over their predecessors of twenty years since. And first, sir, I put aside the assumption, which I regret to see occasionally made in the papers, of superior sagacity and care in the present settlement officers. There is no evidence for the assumption, which at best is not very graceful; and it is probably safe to take it for granted that at both settlements all parties did their duty to the best of their ability and up to the measure of their lights. But is it not evident, sir, that from the very nature of the case the present settlement officers were not only not at an advantage, but at a vast disadvantage, as compared with my honourable friend Sir R. Temple and his colleagues? I must again quote from the Lieutenant Governor the admission that, property having little or no value before the annexation, 'very indistinct ideas' prevailed on the subject of proprietary right. This, then, was the subject-matter of inquiry—a mass of 'very indistinct ideas' which were entertained on a particular subject twenty years ago. Then, sir, the nature of these ideas had to be established by the oral testimony of very ignorant men. It is necessary, sir, to put this clearly, for some of the papers appear to me to disclose a very curious misconception of the settlement officers. They seem to have supposed that what they had to inquire into was

the present ideas of the people on the subject of property and tenancy. But that, sir, cannot be. The true question was whether the first settlement of the Panjáb was at variance with local customs, and the business in hand was to take evidence of those customs as they existed before the annexation. And as to these customs, or rather ideas as to customs, admitted to have been 'very indistinct,' they had to accept the oral testimony of very ignorant witnesses, and, if possible, to make that testimony prevail against a written record made very shortly after annexation. Well, sir, it is almost a proverb in India that oral testimony is of very little value. The strongest statement I have seen on the point fell from the eminent Native Judge who sits on the Bench of the High Court at Calcutta. Nor is it necessary to assign moral defects in the witness as the cause of this untrustworthiness. The truth is, sir, that the power of answering questions intelligently is a fruit and result of the habit of interrogating yourself; and men who do not look into their ideas, who take outward facts as they find them and remember nothing but their actual experience, cannot answer questions except as to the barest matters of fact. The only effect of interrogating them is either to reduce them to confusion, or to get any answers out of them which the questioner pleases. Now I will show presently what was the character of the questions put to the witnesses; at present I will only say that their testimony was oral, and it related to 'indistinct ideas' belonging to the past. But surely, sir, in the Panjáb, as well as elsewhere, evidence grows weaker in proportion as it grows older, and therefore necessarily, through the mere fact of its relating to matters of old date, the evidence taken during the recent settlement operations was incalculably weaker than that taken immediately after annexation. But the age of the evidence adduced before them was by no means the heaviest disadvantage with which the present settlement officers had to struggle. Surely it must be evident that the motives to false testimony had vastly increased, at least on the part of one class. Property in land which had little or no value before the annexation has now a very great and distinct value, and the real struggle obviously is whether, in the case of the occupancy-tenants, the new profits shall be

divided between them and the landlords, or shall go wholly to the landlords. The position, therefore, of the two parties to this contention in the settlement courts was this: on the one side you had very ignorant men asked very difficult questions as to indistinct ideas of old date. On the other, you had witnesses, a shade better educated, more thoroughly aware of the matter in hand, but under the strongest temptation to adapt their testimony to their interests.

Sir, there is much in the detail of the Panjáb settlement-proceedings which relates to matters which are quite foreign to my experience. There are, however, certain peculiarities in the method of inquiry pursued, on which it is not presumptuous in me to form an opinion, and certainly those peculiarities have not given me a favourable impression of the value of the investigation. I observe, for example, that in a great number of cases the persons under examination, whether landlords, tenants, or witnesses, were asked whether a particular class had a right to do a particular thing, and the point was frequently put for decision to the committees who acted as referees. I do not mean to say that the word 'right' was invariably used, but the questions constantly implied the notion of a right or some shade of it. Now, everybody who has paid even a superficial attention to the subject is aware that there is no more ambiguous term than 'right,' and no idea less definite. I do not suppose that in the Oriental patois in which these questions were asked the word is less equivocal than in the cultivated European languages, and yet in Europe it is only the strictest and severest jurists who speak of Rights with accuracy. *Primâ facie*, when you ask whether a class had rights of a particular kind, you mean legal rights; but legal rights imply a regular administration of fixed laws, and there was confessedly no such administration under Sikh rule. Yet I find the settlement-officers inquiring about rights of eviction or enhancement, without explaining (and apparently without being conscious of the need of explaining) whether the rights in question were of the nature of legal rights, or whether moral rights were meant, or whether what was intended was merely the physical power of the stronger to do what he pleased to the weaker. And these difficult and am-

biguous questions—questions which in reality sometimes involved highly-refined abstractions—questions which I do not hesitate to say that, even if I had been cognisant of the facts, I could not always myself have answered without fuller elucidation of their meaning—were put to ignorant and uneducated men, to men therefore who, like all ignorant men, are capable only of thinking in the concrete and in connection with actual facts, and were put, moreover, with reference to a state of facts which ceased to exist twenty years ago. Perhaps, sir, it may be said that the rights about which inquiry was made were customary rights—rights arising under a Custom. But here, so far from having my ideas cleared, I find myself in greater difficulties than ever. For it appears to me that in the papers relating to the recent Panjáb settlement, the word 'custom' is used in a sense certainly unknown to jurisprudence, and I believe also to popular usage. A custom is constantly spoken of as if it were independent of that which is generally, if not universally, considered to be the foundation of a custom. According to the understanding of lawyers—and I should have said according to the understanding of all men, barbarous or civilised—the foundation of a Custom is habitual practice, a series of facts, a succession of instances, from whose constant recurrence a rule is inferred. But the writers of these papers perpetually talk of customs of eviction, of enhancement, or of rack-rent, and in the same breath admit the non-existence of any practice of the kind alleged. Some broadly state that there never was an instance of the customary right being exercised; nearly all allow that its exercise was as rare as possible, nor do they attempt to show that the rare instances of its exercise were not simple acts of violence. Indeed, a good deal of the papers is taken up with conjectural explanations of the reasons why the custom was not acted upon, or, as I should venture to put it, why there was in point of fact no custom at all. A curious illustration of these (to me) remarkable ideas about customs occurs in the suggestions of the gentlemen who lately assembled at Marrí for the revision of the Bill as settled by the select committee. The Bill contained, and still contains, a provision allowing the presumption of occupancy-right, created by entry in the settle-

ment record, to be rebutted by showing that 'tenants of the same class in the same or adjacent villages have ordinarily been ejected at the will of the landlord.' The so-called Marrí Committee proposed to reject this provision, and even the more moderate section proposed to substitute another to the effect that rebuttal should turn upon proof that the entry was opposed to a custom locally recognised and acted upon. Obviously they considered that it would be impossible to show that tenants were ordinarily evicted at will by their landlords. As a mere matter of curiosity, I should really like to see the evidence which would be tendered to a court of justice for the purpose of establishing a custom, in the face of an admission that instances of the exercise of the alleged customary right had never occurred or were extraordinary occurrences. Sir, I must say that, on this ground alone, the claim preferred for the recent settlement to be superior to all former settlements must be held to fail. I do not pretend to have an exhaustive acquaintance with the voluminous literature of Indian revenue settlements; but I know something of it, and I think I can see that the older investigators of Native customs proceeded on a mode of inquiry which is perfectly intelligible. They inquired for the most part into practices and into facts, not into vague opinions. They inferred a rule from the facts they believed themselves to have discovered, and then they stereotyped it. No doubt they may have made mistakes. They may have generalised too rapidly, may have neglected local exceptions, and may have made a usage universal which was only general or even occasional. But at all events their undertaking was perfectly practicable, whereas I doubt whether the method followed in the recent settlement inquiries was not fatal to any trustworthy result.

That, sir, however, is not my case. I say that, even if these beneficial rights of occupancy were really planted in the Panjáb by the British Government, they have grown up and borne fruit under its shelter, and that it is not for its honour or interest to give them up to ruthless devastation. Nor is it solely for the interest of the British Government that they should be protected—it is for the interest of everybody who has a vested right in property, whether movable or im-

movable, and whatever be the form it may take among the innumerable forms which proprietary right assumes in India. There could be no more dangerous precedent than the wholesale obliteration by the Government of vested rights which the Government created fifteen or twenty years ago, merely on the ground that the Government made a mistake. I know, indeed, that it is a point against me that this view does not seem to be taken by the Lieutenant Governor of the Panjáb, whose name is not to be mentioned without respect. But I cannot help thinking that Sir Donald Macleod reconciles these proceedings with his sense of justice and expediency by his belief that a system might be devised of buying out the occupancy-tenants on the principle of equitable compensation. Now, sir, I have always thought that over limited areas of land in India—particularly in the vicinity of great cities, where capital is abundant, and where great cultivation is possible—a system of buying out occupancy-rights for fair value might have much to recommend it, and might solve many embarrassing difficulties. But I am satisfied that for a whole province like the Panjáb such a system would be quite impracticable, and I say this the more confidently because the plan has evidently been suggested by what seems to me an erroneous view of the functions of the English Copyhold Commissioners. It has truly been said, in the first place, that the office of the Copyhold Commission is to get rid, not of the class corresponding to the tenants, but of the class corresponding to the landlords. It is the lord of the manor who is bought out, not the copyholder. Thus it is the few who receive compensation from the many, not the many from the few. Moreover, the compensation proper to be given for the heriots and other manorial dues is calculable with comparative ease, and scarcely amounts in any whole year to a very serious aggregate sum. Still, with all these facilities, the Copyhold Commission is notoriously cumbrous and dilatory in its action. A body of functionaries, however, charged with arranging compensation for all the tenants affected by the recent settlement-proceedings would have a Herculean task before it. The rights to be paid for hardly admit of estimation, and the mass of those rights is enormous. Although, too, the Panjáb has

advanced so extraordinarily in prosperity, it may be doubted whether it contains the means for the pecuniary compensation which would be required; and, indeed, I venture to think that if an attempt were made over territory so vast as that comprised in a whole Indian province to buy out occupancy-rights on equitable principles, no system would be possible except that recently tried in Russia—a system of dividing the land between landlord and tenant, which would probably be infinitely more unpopular with the proprietary class than the present system of dividing the profits.

Sir, I have stated my doubts as to this Bill as strongly as possible, chiefly because, as I said before, I do not think that side of the question has had fair play. But I do not in the least wish to withdraw from the compromise which the Bill embodies. The article of that compromise which involves the greatest concession on the part of those who agree with me is the erasure from the settlement-record of all the tenants, once registered as having occupancy-rights, who have admitted before the present settlement officers that they can be evicted by their landlords. I will not inquire too closely or curiously whether the admission was intelligently given, whether the tenant was or was not thinking of the moral right of his landlord, or of his power as the stronger man. Every compromise must involve concession, and if there is any of these rights which it is equitable to destroy, they are those which the owner has in some sense or other disclaimed. One point, and one only, remains for me to notice. It may perhaps appear at first sight a merely legal point, but it is in reality one of the most far-reaching importance. Sir, what is the proper construction to be put on certain provisions of Regulation VII. of 1822? On the annexation of a new country to the British Indian Empire, two operations are carried through—the revenue payable to Government is settled, and a Record of Rights in land, which has hitherto been considered the surest guarantee of the stability of those rights, is framed by the settlement-officers. When the period for which the revenue has been settled expires, everybody agrees that it can be re-settled according to the increased or diminished profits of the land. But can the Record of Rights be re-cast by the

settlement-officers at new settlements, not on complaint, but officiously and of their own motion? This is the claim of the Panjáb settlement-officers, which I deny on grounds both of reason and of expediency. I admit that the language of the old Regulation is incautious. The truth is, these older enactments were not intended to stand the tests now applied to them; if they were carried out in a sense not intended by their framers, an executive order, which in fact emanated from an authority identical in point of *personnel* with the Legislature, corrected the error. But, I believe, chiefly because the authors of the Regulation were great men and men of strong sense, that they intended nothing so preposterous as a periodical, wholesale, officious revision of the record. Moreover, it is only the 'spirit' of the Regulations which has been extended to the Panjáb, and whatever be the exact meaning of the distinction, it is assuredly the letter, and not the spirit, of the Regulation which countenances these late proceedings. For just see what is claimed. The land in India is the foundation of society, and it is asserted that once every ten, fifteen, or twenty years a number of gentlemen, many of whom it is surely not disrespectful to call young gentlemen, may go in and reconstruct the very basis of society. I have sometimes heard and seen the advocacy of tenant-right called socialistic, but what Communist in his wildest dreams ever imagined a wholesale re-adjustment of rights in land once every fifteen years? There is not, moreover, the smallest security for the principles on which such re-adjustment would take place. If an ordinary contingency of Indian life had happened, and certain able and energetic officials had fallen ill during the late settlement, I am not sure that it would have concluded on the principles on which it began; and, for all I know, if these pretensions be allowed, and if the whirligig of Indian opinion goes round as rapidly as it has done in my time, we may have tenant-right introduced universally fifteen years hence, possibly in imitation of Irish legislation which might have occurred in the interval. There is no question, sir, I suppose, that the extraordinary burst of prosperity which invariably follows the annexation of a new State to British India is chiefly owing to the stability which we give to pro-

perty—more to that, perhaps, than to the protection we give to life and limb. If, however, these novel views as to the unlimited supremacy of Government officers over property prevail, I am not sure we shall not by such experiments arrest the progress of the country in civilisation even more than did the dispossessed Native ruler by his tyranny and oppression.

CIVIL MARRIAGE OF NATIVES

NOVEMBER 27, 1868.

THE legality of the marriage of persons not belonging to any of the recognised religions of India, and not conforming to the rites of any such religion, had long been doubtful. The members of the Bráhma-samája, for instance, having become unwilling to contract marriage, or to allow their children to contract marriage, with the ceremonies practised among Hindús, consulted the Advocate General of Bengal as to the legal consequences of so doing. He advised them that as they had *quoad* their marriages ceased to be Hindús, but had not conformed to the discipline and rites of any religion recognised in India, it was clear that their marriages were invalid and that the issue was illegitimate. At the request of the Viceroy, Mr. Maine had an interview with Keshab Chandra Sen, the leader of the Bráhma-samája. The result was that a Bill to legalise marriages between certain Natives of British India not professing the Christian religion was framed and published. On moving that this Bill be referred to a select committee Mr. Maine spoke as follows:

Sir, this Bill, after leave to introduce it had been given, was published by your Excellency's permission under a suspension of the rules, so that public opinion might pronounce upon it. It has elicited a good deal of criticism, and if the Council will allow me I will proceed to notice briefly some of the observations which have been made upon it. But before I do so, I venture to point out how slight an extension of the existing law is involved in the measure, and that it is only the last of a series of steps which have all been taken in the same direction. I imagine it to be known to the Council that, owing to the language of certain statutes and charters regulating the jurisdiction of the Indian courts, the law of their religion became the law applicable to litigants. There being no fundamental law in India, the doctrine thence prevailed (though I should per-

haps surprise the Council if I were to state how much doubt attends the point) that the greatest part of the civil rights of the Natives of India is determined by the religion which they profess. It would appear that about forty years ago some alarm was excited by the contention that any act which excluded a man from his religious communion entailed the forfeiture of his civil rights. For remedy of this, section 9 of Regulation VII. of 1832 was passed, which provided as follows:—

'Whenever in any civil suit the parties to such suit may be of different persuasions, when one party shall be of Hindú and the other of the Muhammadan persuasion: or where one or more of the parties to the suit shall not be either of the Muhammadan or Hindú persuasion: the laws of those religions shall not be permitted to operate to deprive such party or parties of any property to which, but for the operation of such laws, they would have been entitled.'

The language of this provision, it will be seen, is somewhat cumbrous and perplexed, and, moreover, it merely applies to Bengal. Accordingly, the Legislature of the day passed Act XXI. of 1850, of which section 1 is to this effect:—

'So much of any law or usage now in force within the territories subject to the Government of the East India Company as inflicts on any person forfeiture of rights or property, or may be held in any way to impair or affect any right of inheritance, by reason of his or her renouncing, or having been excluded from, the communion of any religion, or being deprived of caste, shall cease to be enforced as law in the courts of the East India Company, and in the courts established by Royal Charter within the said territories.'

That is the *Lex Loci* Act of Lord Dalhousie's Government, which is still the charter of religious liberty in India. I myself do not entertain a particle of doubt, and I venture to think that no member of the Council who has read the discussion which preceded the enactment will doubt, that it was the intention of the framers of that Act to make it complete, and to relieve from all civil disabilities all dissidents from Native religions. It was meant to condone all offences against religious rule, whether they were acts of omission or of commission. But probably from mistake, probably from attending too exclusively to the immediate question before them, which affected only the first generation of dissidents, they left standing the greatest of all disabilities—the disability to contract a lawful

marriage. It is incredible to me that, except by an oversight, they should have expressly provided for the protection of the right of inheritance but should have omitted to provide for the right of contracting marriage, without which inheritance cannot arise. There has been received a petition from the British Indian Association of Bengal, in which the Association objects not only to the present measure, but to Act XXI. of 1850, which they say was passed against the wishes of the Native community. The Council will no doubt attach to the arguments of that petition such weight as it may think fit, but at present I claim the statement as to the *Lex Loci* Act as an admission that the principle of one includes the principle of the other, and that he who objects to the present Bill must also object to Lord Dalhousie's measure. There is, however, no doubt a defect of the law which has been brought to notice by a portion of the sect of Hindús known as the Bráhmos, who celebrate their marriages according to a ritual which they consider purified. An opinion of the Advocate General given on a case stated by them is to the effect that these marriages are invalid, and the offspring of them accordingly illegitimate. I do not dissent from Mr. Cowie's opinion, and indeed I do not see how he could have given any other from a purely legal point of view. But it is impossible to have stated a principle of more formidable application. For example, the civil rights of the Sikhs in the Panjáb depend on the rules of their religion, because the Sikhs are considered to come under the description of Hindús within the meaning of the earlier statutes. But are the marriages of Sikhs celebrated with orthodox regularity?—and, if they are, where does orthodoxy begin and where does it end? I have mentioned the Sikhs, not for the purpose of starting this question, but on account of a fact which has become known to me since the Bill was published, and is doubtless known to your Excellency, that the Sikh religion, in itself a modern religion, has a tendency to throw off sub-sects which adopt considerable novelties of doctrine and practice. And in fact it would seem that the same process goes on all over India, and even in provinces little affected by education and by the indirect influence of Christianity. The immobility of Native religions, no doubt, exists, but it exists

within shifting limits, and there is much more formation of new creeds and practices than *primâ facie* appears. Now to all these new religious communities the legal doctrine of the Advocate General applies. One reason, however, why we should remove the difficulty is that, in my humble judgment, it is entirely of our own creation. It must strike every observant man that, by our introduction of legal ideas and our administration of justice through regular courts, we give a solidity and rigidity to Native usage which it does not naturally possess. It seems to me that, in order to prevent the monstrous injustice which occasionally results from this process, we must control it by the proper instrument—timely legislation.

Sir, I now proceed to the principal objections which have been raised against the measure. In front of these I place the objection that it does not apply to Christians. Now, sir, every imputation that this Government intends to establish an inequality between different classes of Her Majesty's subjects is serious, and therefore I am much indebted to those who have pointed out that this objection rests upon misapprehension. The words which render the Bill inapplicable to persons professing the Christian religion are taken from the Statute 14 & 15 Vic. c. 40, which regulates the civil marriage of Christians in India.[1] It was necessary to keep the two systems of registration apart, since it would generally not be convenient for Native gentlemen and ladies to have recourse to the registrar appointed under the statute. But the principle of the present measure is to place Natives as nearly as possible on the same footing as Europeans.

Sir, the next objection—and no doubt this is a more genuine and sincere objection—is that civil marriage is quite modern in Europe, and that India may not be sufficiently advanced to dispense with the necessity of the forms of a religious marriage. The fallacy of the argument does not lie in the misstatement of the fact, but in the application of it, and in the assumption that it has any relevancy to the condition of India. It is true that civil marriage, which was once an universal institution of the Western world, disappeared for several centuries, and was only revived about a hundred years ago by the

[1] Since repealed by the Statute Law Revision Act, 1875.

Emperor Joseph II. in the hereditary States of the House of Austria. Probably, the last relics of the absolute obligation of religious marriage are at this moment disappearing in Spain. But the theory which imposed religious marriage in Europe has never had any counterpart in India. In European countries the legislator believed, or professed to believe, that some one religion was true, and could alone impart efficacy to the rites by which marriage was celebrated. That was his justification, whatever it was worth. For the protection of that one religion, and in its interest, he compelled everybody to submit to its ceremonial. But there never has been anything like this in India under the British Government, and whatever were the theory of the Muhammadans, there was nothing like it in their practice. It is a famous saying of a well-known French statesman, that 'the law should be atheistic.' Well, if the expression be permissible, the law of marriage has in this country always been atheistic, in the sense that it has been perfectly indifferent between several religions of which no two could be true. One may be true, but not two. This peculiarity of Indian law results in the rule that a man may at pleasure desert the religion in which he was born and contract a civil marriage. A Hindú can become a Christian or a Muhammadan, or he may adopt the fetichism of the Kóls or Sánthals, and he can contract a lawful marriage. But if he stops short of that, as the law stands, marriage is denied to him. Take the case of a Hindú becoming a Muhammadan, a kind of conversion which goes on every day of our lives. The convert is compelled by the principles of his new religion to regard the faith of his ancestors as hateful and contemptible. But if he does not go so far as that, if he retains some tenderness for his old faith, and continues to regard it as not absolutely evil, he is debarred from all share in the fundamental institution of organised civil society. Such a state of the law is unexampled in Europe. Nothing in the Western world has any relevancy towards it or bearing on it.

I now pass to another objection, which is no doubt sincerely advanced. It is said that we are bound to protect the Native religions to the extent of forbidding their adherents to desert them, except for a recognised religion. There is no

doubt that there is some sort of indirect protection to Native religions given by this state of the law of marriage in the existing condition of Native society. Now, can we continue this protection? I think we cannot. Take the case of the applicants for the present measure. They say that the ritual to which they must conform, if they wish to contract lawful marriages, is idolatrous. I don't use the word offensively, but merely in the sense in which a lawyer in the High Court is occasionally obliged to speak of the family idol. They say that the existing Hindú ceremonial of marriage implies belief in the existence or power of, and worship addressed to, idols. No doubt there are some of the Bráhmos who have as little belief in these beings as the applicants, but still do not object to go through the ritual; and, naturally enough, they exhibit considerable impatience at the scruples of their co-religionists. But that is only a part of the inevitable history of opinion. The first step is to disbelieve; the next to be ashamed of the profession of belief. The applicants allege that their consciences are hurt and injured by joining in a ritual which implies belief in that which they do not believe. Now, can we compel them to submit to this ritual? Sir, nobody can feel more strongly than I do that we are bound to refrain from interfering with Native religious opinions simply on the ground that those opinions are not ours, and that we are bound to respect the practices which are the expression of these opinions, so long as they do not violate decency and public order. That is the condition of our government in this country. I will even go further and say that, where a part of a community come forward and allege that they are the most enlightened members of it, and call on us to forbid a practice which their advanced ideas lead them to think injurious to their civilisation, the Government should still be cautious. This is the case of those enlightened gentlemen who ask us to abolish polygamy, both as regards themselves and as regards their less informed co-religionists who do not agree with them. Here the Government of India, acting in concurrence with the Government of his Honour the Lieutenant Governor, has declined to listen to the petition, much as may be said for it. Here, however, we have a very different case. A number of

gentlemen come forward and ask to be relieved from the necessity of submitting to rites against which their own conscience rebels. They do not ask to impose their ideas on others, but to be relieved from a burthen which presses on themselves. Can we refuse the relief? I think we cannot. I think the point is here reached at which it is impossible for us to forget that we do not ourselves believe in the existence or virtue or power of the beings in whose honour this ritual is constructed. And I say this the more confidently, because I believe that such a doctrine is in the true interest of the sincere believers in Native religions. If we once begin trampling on the rights of conscience, it is very far from certain that the process will continue for the advantage of Native religions. The members of these communities have the strongest reason for maintaining the absolute sacredness of the rights of conscience.

I now pass to a few verbal criticisms, for some of which there is foundation. It is objected that it is doubtful whether, in section 1, clause 2, the word 'unmarried' includes a widow. I do not feel any doubt myself as to the interpretation which a court would put on the word, but it can be made still clearer in select committee. The words 'without having been lawfully divorced,' in section 8, have also attracted notice, and it has been asked whether the Government is about to propose a law of divorce. The words, I apprehend, must stand, because the measure may possibly apply to sects who have a law of divorce, and, indeed, even among the Bráhmos there are (I am informed) some Muhammadans whom it is not proposed to deprive of any of their privileges, except in so far as they are modified by this measure. So far as concerns the Hindús, there is not, on the part of your Excellency's Government, any intention to propose a law of divorce for them, and I am told that the Bráhmos do not consider their sect sufficiently advanced for such a law.

Another objection which requires attention is that the Bill does not compel the registrar to go to the house of the persons intending to marry. There is nothing to prevent his going, but it is said that he may demand an exorbitant fee as the price of his presence. That may be set right by a provision that he shall attend at the house of the marrying

parties on a fee being paid somewhat in excess of the ordi nary fee.

Sir, I now come to a difficulty of which I myself have, from the first, felt the seriousness. When I obtained leave to introduce the Bill, I stated that I was not satisfied with the table of prohibited degrees. It was introduced at the suggestion of the applicants, and represents, I believe, the ideas of educated Hindús of some social position in Bengal. But it does not accord with Muhammadan ideas, and still less with the usage of Hindús beyond Bengal. The petition of the British Indian Association objects to the Bill that it legalises marriages between members of different castes. The gentlemen who have joined in that petition have, however, too good legal advice to be ignorant that, though inter-marriages between the castes are no doubt improper according to Hindú notions, there has always, and everywhere, been a doubt whether the impropriety amounted to illegality. I am not now speaking of this class of prohibitions, but of the prohibitions in force in large portions of Upper India. These are extremely numerous and complex, and turn not so much on proximity of blood as on tribal relation. The whole subject is one of some interest, and has been lately examined by a member of my own profession, Mr. McLennan.[1] Reasonable or unreasonable, these prohibitions are tenaciously adhered to by certain of the Natives of Upper India, and would no doubt be enforced by the courts. The difficulty of constructing a table of prohibited degrees which would suit all Natives of India is so enormous that I am inclined to suggest, for the consideration of the select committee, a provision that nobody shall be allowed to marry, under the new law, any man or woman whom she or he might not lawfully have married if the law had not passed. This will enable us to get rid of the schedule altogether. I am the more inclined to recommend this course because I do not think that the table of prohibited degrees in use in the Western world can be defended on grounds universally applicable. It seems to me that such a table can only be constructed on two sets of principles. Either it may be framed on physiological considerations, or

[1] See McLennan's *Primitive Marriage*, reprinted in his *Studies in Ancient History*, London, 1876.

on considerations arising from the feelings—or, it may be, prejudices—of the community affected. No doubt our English table is very much more liberal than any that could be framed for India. But it can hardly be said to be constructed on physiological principles, for if it were I presume a man would be allowed to marry his deceased wife's sister, and it is probable that the marriages of first cousins would be prohibited. Everybody knows that this permission and prohibition are always defended on peculiarities in the social organisation of Western society. I will further allege, as a reason for the provision I suggest, that when civil marriage was introduced into England about forty years ago the area of inter-marriage was not enlarged. A man could no more than before marry his deceased wife's sister, nor could a person, ecclesiastically divorced, marry without a special Act of Parliament. European precedents are, therefore, in favour of the course which I am inclined to propose, and which amounts to limiting the measure for the present to the relief of conscience. I do not deny that this change will to some extent diminish the liberality of the Bill, but it removes a very serious difficulty, and I find that the Bráhmos themselves do not wish the power of inter-marriage to be enlarged, having always confined themselves within the boundaries of the existing laws. I believe, too, that our honourable colleague the Mahárájá of Balrámpúr will have his only objection to the Bill removed by this alteration. It is necessary, however, for me to say that the section I suggest must be very carefully framed. The prohibition of marriage which it will recognise must not be one dependent on the performance of any religious ceremonial, or the whole measure may be defeated.

Sir, I have to state in conclusion that, in my humble opinion, there can be no worse penalty on improper marriages than the disallowance of such marriages. Such a penalty has almost no characteristic which should distinguish a penalty. As regards those persons who directly join in the supposed offence, it falls on the more scrupulous and leaves the less scrupulous untouched. But in fact it hardly falls on the supposed offenders at all. It is really imposed on the

children, who are dishonoured through life for an offence in which they could not possibly have participated. If it be really necessary for us to protect the Native religions by forbidding marriages not celebrated with their rites, it is much better that we should effect this by any direct civil penalty—or, if necessary, criminal penalty—rather than by the disallowance of the marriage.

The Bill, with some modification, became law as Act III. of 1872, *to provide a form of marriage in certain cases.* It applies only to persons who do not belong to the Christian, Jewish, Hindú, Muhammadan, Párasi, Buddhist, Síkh, or Jaina religion.

EVIDENCE

DECEMBER 4, 1868.

DOWN to 1872 the courts of India, except in the presidency towns, had hardly any fixed rules of evidence, save those contained in Acts XIX. of 1853 and II. of 1855. The result was that, in the Mufassal, the discretion of judges in declaring facts proved or disproved was practically unlimited; decisions were delayed for an unconscionable time; needless vexation and expense were caused to litigants; and injury to the State or the public sometimes arose from the absence of rules as to official communications, and information as to the commission of offences. Under these circumstances, the Commissioners appointed in England to prepare a body of substantive law for India (disregarding the fact that evidence belongs to the department of adjective law) prepared a Bill to define and amend the law of evidence. When moving that this Bill be referred to a select committee Mr. Maine said that

the Council were no doubt aware that, on referring a Bill to a select committee, what was affirmed was the principle of the measure or the expediency of legislation within the general principles of the measure. This being understood, Mr. Maine did not suppose that the Council would ever seriously think of refusing to refer to a select committee a Bill prepared by the Indian Law Commissioners, and therefore he should say very little in commending it to the Council. The consideration of the measure was essentially a consideration of its detail, and to that detail the select com-

mittee would doubtless give the most careful attention, not, as Mr. Maine hoped, for the purpose of setting its judgment against the judgment of the Commissioners in matters which lay legitimately within the sphere of their great judicial and forensic experience, but for the purpose of seeing whether their specific proposals required in any way restriction or extension with regard to the special circumstances and facts of this country.

On the general expediency of obtaining a codified law of evidence for India, Mr. Maine did not suppose that there could be two opinions. He ventured to think that the Commissioners had, if anything, rather understated the grounds on which such a law was desirable. They observed that India did not possess any uniform law on the subject. After stating that within the presidency towns the English law of evidence was in force, modified by certain Acts of the Indian Legislature of which Act II. of 1855 was the most important, they went on to say that a customary law of evidence prevailed in those parts of British India where English law was not administered. 'This customary law,' they added,

'has not assumed any definite form; the Muhammadan law, since the enactment of the new Code of Criminal Procedure, has ceased to have any validity in the country courts, even in criminal matters; and those courts have in fact no fixed rules of evidence except those contained in Act II. of 1855. They are not required to follow the English law as such, although they are not debarred from following it where they regard it as the most equitable.'

On looking, however, at the two Indian Evidence Acts, it would seem that they implied that the English law of evidence, except where they modified it, was in force in the bulk of India, the Mufassal. During the last ten or fifteen years the doctrine that the English law of evidence was *vi propriâ* in force thoughout the whole of the country had certainly gained strength, and the habit of applying that law with increasing strictness was gaining ground. No doubt much evidence was received by the Mufassal courts which the English courts would not regard as strictly admissible. But Mr. Maine would appeal to Members of Council who had more experience in the Mufassal than he had, his honourable friends

Sir George Couper and Mr. Cockerell, whether the judges of those courts did not as a matter of fact believe that it was their duty to administer the English law of evidence as modified by the Evidence Acts. In particular, Mr. Maine was informed that when a case was argued by a barrister before a Mufassal judge, and when the English rules of evidence were pressed on his attention, he did practically accept those rules, and admit or reject evidence according to his construction of them.

Mr. Maine could not help regarding this state of things as eminently unsatisfactory. He entirely agreed with the Commissioners that there were parts of the English law of evidence which were not suited to this country. They heard much of the laxity with which evidence was admitted in the Mufassal courts; but the truth was that this laxity was to a considerable extent justifiable. The evil, it appeared to Mr. Maine, lay less in admitting evidence which under strict rules of admissibility should be rejected, than in admitting and rejecting evidence without fixed rules to govern admission and rejection. Anything like a capricious administration of the law of evidence was an evil, but it would be an equal, or perhaps even a greater, evil that such strict rules of evidence should be enforced as practically to leave the court without the materials for a decision. Mr. Maine would venture to state his impression that the fault of substance ordinarily committed by the Mufassal Courts consisted less in lax admission of evidence than in averting their attention from the evidence really before them, and in conjecturing the facts of the case upon probabilities derived from a consideration of what the Natives of this country would be likely to do under given circumstances. Another objection lay in the necessity which the Mufassal judges were thus placed under of depending upon English text-books. There were excellent text-books of the English law of evidence, but their usefulness consisted more in refreshing knowledge which had been gained by forensic experience than in teaching knowledge. The Commissioners would appear to be right in supposing that what was wanted for the greatest part of India was a liberalised version of the English law of evidence, enacted

with authority, and thus excluding caprice, and superseding the use of text-books by compactness and precision.

Another objection which Mr. Maine entertained to the present state of the law might appear to be speculative, but was really of some practical moment. The doctrine that the English law of evidence without authoritative enactment prevailed *vi propriâ* and of its own virtue, was calculated to encourage the notion that rules of evidence constituted a scientific machinery by which truth as to facts and as to men's actions could be ascertained somewhat as physical truths could be ascertained by the processes in use among men of science. There were certain Continental systems of evidence which did make a pretension to include a process of the kind. And perhaps some such theory did pervade the rules of the English law with regard to presumptions, which he was happy to see the Commissioners had discarded. But the English law of evidence as a whole made no claim to be such a system. It was justly regarded by English lawyers as a model of good sense; but it would probably have never come into existence but for one peculiarity of the English judicial administration—the separation of the judge of law from the judge of fact, of the judge from the jury. It consisted mainly of rules of exclusion —that is, of rules for keeping certain kinds of evidence out of sight of the judge of fact. Such a system, Mr. Maine apprehended, could only be justified on two grounds. First of all some evidence must be excluded. If all evidence were admitted—nay, even if all relevant evidence were admitted—if everything were let in which tended to throw light on the matters in issue, the courts would be overwhelmed. Even in England they would break down, and it would be quite impossible for the courts to discharge their functions in this country with the notorious habit of its Natives of attempting to help on the proof by accumulating everything which has even the remotest bearing on it. It being, then, assumed that, under the actual conditions of judicial inquiry, some sorts of evidence must necessarily be shut out, the English law excluded those descriptions of evidence which were found practically to affect the minds of all men, except those of the

most sagacious judgment, out of all proportion to the real value of such evidence. This was the case of the great department known to English lawyers as 'hearsay.' It was not at all meant that hearsay evidence was not incidentally valuable, and Mr. Maine could well imagine a great Indian statesman conducted in an emergency to a most important conclusion by evidence which a court of justice would reject as absolutely inadmissible. But, taking men as you found them, and taking the average of judicial ability, it was really true that some kinds of evidence did produce an impression on the mind far deeper than was consistent with their real weight. The good sense to which the English law laid claim was evinced by the tests which it laid down for distinguishing those kinds of evidence from those which remained. It would be presumptuous in Mr. Maine to praise the Commissioners' proposals; but he ventured to say that, in his humble opinion, they had wisely availed themselves of the results of English experience, but had wisely modified those results upon two considerations, which they stated as follows :—

'The English practice has been moulded in a great degree by our social and legal institutions, and our forms of procedure; and much of it is admitted to be unsuited to the various states of society, and the different forms of property which are to be met with in India.

'In a country like India, where the task of judicial investigation is attended with peculiar difficulties, and where it is the duty of the Judge in all civil, and in some criminal, cases to decide without a jury, there is greater danger of miscarriage from the mind of the court being uninformed than from its being unduly influenced by the information laid before it.'

Mr. Maine had said that he would not comment on the details of the measure; but there was one point of detail which it was necessary to notice, because, as it involved a financial question, the select committee would probably not like to deal with it without knowing the opinion of the Executive Government. The Commissioners' draft, and the Bill based upon it, saved the Registration Act; but it would be observed that they did not refer to the Stamp Act. The omission in the Bill was explained by its being doubtful whether the Stamp Bill now in the hands of Mr. Cockerell would or would not

receive the assent of the Governor General before the present measure. If the Stamp Bill were passed last, it would control the present measure. But another reason must probably be assigned for the omission in the Commissioners' draft, which appeared to be deliberate. Mr. Maine found that the last paragraph of their third Report, on the Law of Negotiable Instruments, was to the following effect:—

'Negotiable instruments have recently been subjected to a stamp duty in British India by an Act which, like the English Stamp Act, renders instruments invalid if its regulations are not observed. This provision of the English Stamp Act has led to the establishment of several rules and distinctions not unattended with inconvenience, and we would suggest that a law which merely imposed a penalty in case of infringement would be more conducive to the public interests. For the present we have thought it our best course to frame our rules irrespectively of the stamp law.'

Now, from the Commissioners' point of view, which was the purely juridical point of view, there was no doubt that simplicity would be attained by the course proposed. But what would be the practical effect? His honourable friend Mr. Cockerell had had a vast mass of papers before him relating to the operation of the Stamp law. Mr. Maine appealed to him whether the following was not a fair inference from those papers. If effect were given to the Commissioners' suggestion, either there would be an enormous evasion of the law, or that evasion would be prevented by recourse to the criminal courts for the enforcement of penalties to an extent which would itself be a greater evil than the sacrifice of any branch of revenue. Under those circumstances, the point had been considered by the Executive Government, and Mr. Maine had to state that, having regard to the fact that the stamp duties on commercial instruments were easily levied, and did not press hardly on the people, the Government was not prepared to give up that portion of the public receipts.

The motion was put and agreed to.

The Bill was published and circulated in the usual way. But it was held by high Indian authorities to be both incomplete and ill-arranged; it was not elementary enough for the judicial officers for

whose use it was designed, and it assumed an acquaintance with the law of England which could scarcely be expected from them. For these reasons it was withdrawn, and the Indian law on the subject is now contained in Act I. of 1872, a measure framed by Mr. (now Sir Fitzjames) Stephen, its amending Acts, and a host of special and local laws.

MINUTES

MOST of the following minutes are taken from a collection of one hundred, which was made in 1890 by the Secretary to the Legislative Department of the Government of India, and printed at Calcutta in the same year by the Superintendent of Government printing. This collection was never published, and is of extreme rarity. These minutes may be regarded as fairly representing Mr. Maine's many-sided labours in his executive capacity. But it is hardly necessary to say that reasons of State preclude the publication of some which he wrote for the Foreign Department. The minute on the Educational service, and that on the trial, &c., of European British subjects under jurisdiction assumed by Native States, are printed from copies found after his death among Sir Henry Maine's papers. The minute on the selection and training of the candidates for the Indian Civil Service was written in England, and is now reprinted from pp. 305–309 of the Blue-book dealing with this subject, which was presented to Parliament in 1876.

In arranging the minutes now published the chronological order has been followed.

A despatch drafted by Mr. Maine in 1868, which resulted in the enactment of the Statute 33 Vic. c. 3, and a memorandum on Mr. Caird's report on the condition of British India, have been treated as minutes and inserted in their proper places.

SUSPENSION AND REMISSIONS OF SENTENCES[1]

NOVEMBER 29, 1862.

I CONCUR with Mr. Harington that the power of pardon, and the other powers which it includes, are incapable of direct delegation, unless under the provisions of an express enact-

[1] The Indian law relating to suspensions, remissions, and commutations of sentences is now contained in the Code of Criminal Procedure, secs. 401 and 402.

ment. This is a universal rule of civilised jurisprudence, and the reason assigned for it by the older jurists is that the executive governor enjoys this privilege as the lieutenant of the Deity, so that the legal maxim applies 'delegatus non potest delegare.' The theory, however, has not prevented the delegation of the power in many countries through the medium of legislation, and of course it is virtually set aside when, as in England, the sovereign systematically follows the recommendation of a particular functionary.

The Secretary is no doubt correct in his impression that the line of demarcation between the executive and judicial exercise of the power of pardon is evanescent. Its tendency to become so has long displayed itself in England, and increases every day. Originally, as might be inferred from the old theory, the exercise of the power was matter of grace and favour; more recently it came to be controlled by considerations of State policy or popular sentiment; and now at length it is rapidly becoming identified with a rehearing of the whole case before the Home Secretary.

I believe that this state of things is felt in England to be eminently unsatisfactory. The Home Secretary has of late years always been a lawyer, principally because the conduct of these investigations has become one of his most important duties. He is, however, necessarily deprived of what in England is considered the best of all helps to a correct decision, the opportunity of observing the demeanour and language of the witnesses and prisoner. The disadvantage under which he is placed is felt to be so great that proposals have been made—and, I understand, seriously entertained—for substituting a formal new trial before a Committee of the Privy Council for the intervention of the Home Secretary.

In India the system of trying men on paper has long prevailed, and it may well be that functionaries long accustomed to it may have acquired a special faculty of interpreting written evidence which could not be obtained by ordinary experience. But I must say I think it a hard and, I may add, a very painful task for the Governor General, and, in cases where his Council is consulted, for Members of Council unused to Indian practice, to have to decide capital questions

in the last resort upon materials which, judged by an English standard, must be deemed necessarily imperfect. The inherent difficulty must be faced occasionally—for instance, when proceedings of a court-martial are submitted for approval; but I own I look with dismay on the effect of the present state of the law on the Governor General's position. It seems that the recent extension of the Judicial Commissioner's powers will frequently render it necessary for the Executive, as possessing the power of pardon, to review quasi-judicially the decisions of this functionary in all non-regulation provinces to which the Code of Criminal Procedure has been extended; and it appears further that in one only of such provinces is it certain that the Chief Commissioner possesses the pardoning power. The Governor General, therefore, or the Governor General in Council, is in some danger of becoming a regular Appellate Judge. If he has to discharge such functions, he will be, it must be observed, in a much worse position than the Home Secretary in England, for trials in England are universally conducted by a Judge and jury together, and the Secretary of State has always the power of asking the Judge, apart from the jury, whether he is satisfied with the verdict. But, whenever the Governor General has to exercise judicial under the guise of executive functions, he has in effect to decide an appeal from Judges who have been acting as Judges both of fact and of law.

Where the Chief Commissioner, as in Oudh, is invested with the power of pardon there will be no difficulty, as Mr. Harington has remarked. Where, however, he has no such power, I would suggest that the Governor General should, at all events to a great extent, regard him as the Sovereign at home regards the Home Secretary; that, where his intervention is called for by petition or otherwise he should be required to investigate the case and state his opinion, and that his opinion should ordinarily, if not always, be adopted by the Supreme Government.

MARCH 10, 1863.

I DO not think it would be illegal for the Governor General, without the sanction of any legislative enactment, to direct such Chief Commissioners as have not the power of pardon to suspend the execution of sentences in case of necessity until the pleasure of the supreme pardoning authority is known.

I presume that the question is only put to me with reference to capital sentences.

Reprieves, which are suspensions of the execution of sentences, though closely connected with pardons, do not stand on precisely the same footing. In England the King alone can pardon, but the old Statute (27 Henry VIII. c. 11), which declares a rule common to all modern systems of law, applies to pardons and remissions of sentences only, *not* to reprieves. Many reprieves are in fact granted without the sanction of the Crown. A Judge can reprieve a convict even after he has passed sentence, if he thinks the pleasure of the Crown should be appealed to, and he can do this even after closing his commission. Sometimes a reprieve can be claimed on behalf of a prisoner as of right; for instance, where a female convict is pregnant or where a convict after judgment becomes insane. Nor do I doubt that, where a functionary in England charged with the execution of a capital sentence—such as a sheriff—*bonâ fide* believes that if certain circumstances connected with the convict were known to the Crown it would extend to such convict its clemency, he would be held justified in deferring execution till the pleasure of the Crown should be ascertained.

The state of English law appears to me a sufficient guide in the application of general principles to India. Every power distinctly conferred implies the existence of powers necessary to its exercise, and the pardoning power, which is looked upon with peculiar favour in jurisprudence, draws with it all powers clearly ancillary to it, and among these appears to me to be the power of directing local authorities to suspend the execution of sentences in cases where particular circumstances

(such as difficulties of communication and distances in India) occasion delay in ascertaining the pleasure of the Supreme Government.

I think, therefore, that the Governor General may legally issue such an order as is contemplated in His Excellency's note, and I am able to say that Mr. Harington concurs in this view.

Of course this species of reprieve should only be granted on clear occasion, and I would suggest that, as in the English Home Office, such business should always be taken up at once, and the report of the Chief Commissioner forwarded to His Excellency with as much despatch as may be practicable, in order that, if possible, His Excellency's decision should be notified within the ordinary time for the execution of the sentence. It is obvious that the ordinary course of justice should be interrupted as sparingly as may be.

The communication of the Chief Commissioner who reprieves a prisoner should be addressed to the *executive* officer charged with carrying out the sentence; and, even if this officer have judicial powers, it should be addressed to him in his *executive* capacity.

SERVITUDE IN OUDH

MAY 25, 1863.

IT is almost impossible to form a clear opinion on the questions raised in these papers without seeing the actual contracts to which they refer. Almost everything will depend on the phraseology of the particular contract, and a good deal on the form of the suit. Some principles may, however, be laid down.

An agreement to be a man's serf or slave is invalid in law, both as being against public policy and in most cases as amounting, on the part of the contractee, to the offence made punishable by the 370th section of the Penal Code. It is not very easy to frame a contract in English which would come within this description, but I can quite conceive such an agreement in India. If, for example, there had once existed in Oudh or elsewhere a system of undoubted slavery which

had become illegal from the introduction of our laws or from some other cause, and if a contract were made which by its terms or its language placed one of the parties in the exact position in which he would have been placed as a slave while acknowledged slavery lasted, then such a contract would be entirely bad in law, and no damages would be recoverable for its breach.

But a mere contract to serve, that is, to render services, whether domestic or agricultural, is perfectly legal without reference to the period for which it is made. If it be for an unlimited—that is, an indefinite—time, then, as the first orders of Government correctly stated, it will be presumed to be for a single year. But if definiteness be given to the period by agreeing to serve for a term of ninety-nine years or for life,[1] the contract will still be good, and no such presumption as that just mentioned will arise. So far I concur with the Advocate General. When, however, Mr. Cowie goes on to say that damages for the breach of such contracts must be calculated with reference to the period of limitation, although I do not dispute the literal truth of the proposition, I think it requires explanation. The English writers on the law of contract, one of whom is quoted by Mr. Harington, hardly notice contracts to serve for life or ninety-nine years (if one so long live). They merely say that such agreements are not illegal, but add that they are so improvident *ex facie* that hardly any sum would be too small to award as damages for their breach. Mr. Cowie's statement must, I think, be taken as true only of the maximum damages which under any circumstances can be awarded. It is not absolutely true that very long contracts to serve are necessarily improvident. There is one case in particular, that of an agreement to serve in a trade which is conducted on a trade secret, in which contracts to serve for very long periods are not uncommon; for the breach of such contracts as these, even perhaps when they contemplate service for the whole of life, it might be proper to take the period of limitation as a guide to the amount of damages. But in respect of such contracts as are described

[1] That a contract to serve during one's whole life a particular master is valid, was held in *Wallis* v. *Day*, 2 M. & W. 273, 1 Sm. L.C. 361.

in these papers, the other and more usual rule is clearly, I think, the one to be followed, and the smallest possible damages should be given to a plaintiff suing on their breach.

There are, however, many expressions in these papers which make me suspect that the actual contracts on which the question arises do not take so simple a form as I have been supposing. It may be that the suits mentioned in the papers are not suits directly instituted to enforce agreements to serve, but are merely suits to recover bond-debts, the defendant being in fact bound to labour, not by express agreement, but simply by the compulsion of his debt, which is kept hanging over him. Or, again, the defendant may have acknowledged that he owes a certain sum and may have contracted to work it off at a certain rate. In the first case, unless some independent defence can be pleaded to the suit the decree for payment of the debt must be passed against the defendant; in the last case, the decree can only be for payment subject to an account for the sum worked off.

On the assumptions I have just made, the mischief in Oudh is not the existence of any particular system of servitude, but the improvidence (which, I need not say, is not confined to Oudh) of the labouring class in taking advances or in acknowledging debts which have accumulated at usurious interest. No direct relief can be given to labourers who have thus entangled themselves, but indirectly the courts in Oudh could probably mitigate oppression by bringing it to the knowledge of the labouring class that no man is bound to take upon himself advances made to, or debts incurred by, his father, otherwise than to the extent of any assets he may have received by inheritance. I say this because it seems to be hinted in the papers that the debts sometimes descend from father to son. It would also be well to make the 280th, 281st, and 282nd sections of the Code of Civil Procedure[1] as notorious as possible, under which a very simple system of bankruptcy is provided for debtors under one hundred rupees.

Till I know more of the contracts in question, and more of the nature and extent of the evil complained of, I am not prepared to say that any legislation is required. If the con-

[1] The Code in force at the date of minute was Act VIII. of 1859.

tracts be such as I last assumed them to be, the only legislative relief admissible would take the shape of extending the limit of bankruptcy.

LEGAL EDUCATION OF CIVIL SERVANTS

DECEMBER 2, 1863.

I CONCUR in Mr. Harington's conclusions, and, substantially, in the grounds assigned for them. If there is any part of his minute to which I feel inclined to take exception, it is that in which he palliates (or rather his authorities palliate) the deficiencies of the Zila Judges. Complaints about persons do not readily find their way upon paper, but if I am to judge from the course of conversation in India, particularly among gentlemen who are themselves acknowledged to be the best lawyers in the service, I should be disposed to believe either that we have fallen on an exceptional period in respect of the qualifications of Zila Judges, or that the executive branch of the service so takes precedence of the judicial as to absorb much more than its due proportion of the available talent in the country. The last, I suppose, is the true explanation, to judge at least from a fact which came to my own knowledge. A civil servant, to whose continuance in executive employment there were apparently some objections, was, about six months since, appointed by the Bengal Government to a Judgeship in spite of his energetic protestations of his incompetency, and even his avowals of his ignorance of the language in which justice was to be administered.

Nor can I quite agree in the supposed simplicity of Indian law as compared with English. I suspect that this simplicity, where it seemed to exist, came from a cause which is ceasing to operate—the fact that there were not legal advisers, pleaders and advocates, to take, on behalf of litigants, the subtle distinctions of which no law admits so readily as a law which, like that of India, is very slightly settled and ascertained. The only department of Indian law on which legal ingenuity has been much exercised—the law of Revenue and Tenure in Bengal—appears to me as difficult and intricate as any system of jurisprudence in the world. But we will hope that

the growing intricacy and technicality of Indian law will be obviated by the true remedy, the development of clearly-written statute law, and the introduction of a code or substantive body of fundamental rules.

From the best attention I have been able to give to the matter I have come very decidedly to the conclusion that the real key to this educational difficulty, which is very real and very pressing, is to be found, both as regards law and language, not in India but in England. Make what rules we will, this is not a good country for education, which will always here be costly and inefficient. The presence of official responsibility is necessary to make a man work in such a climate. The only alternative is to keep the student-servants somewhat longer in England, to which detention the chief objection is that it adjourns the period of coming out. But when we have once sacrificed the undoubted advantage of bringing youths to India just when manhood is beginning—that is, at about eighteen—I find that the best Indian physiological authorities do not think that differences of a year or two in age are of any importance. I would keep, therefore, the students in England a year longer, and would have that year entirely devoted to vernacular languages and law. As soon as they come here, I would at once put them to real work; and they would then begin the only education which is efficiently carried on in this country—education in the application of knowledge already gained, and in the oral use of languages already learned.

I am very far, indeed (as I have stated elsewhere), from undervaluing the legal course traversed by students in England during their year of probation. But the defect of that course is that it is somewhat over-brief, and, as might be inferred from the list of books given by Mr. Harington, that it is rather too bookish; this last is a material fault in a country like England, where scarcely any legal literature exists except manuals for practitioners. I am inclined to suggest that (if the subject is sufficiently within our cognizance for us to take the step) the Secretary of State might be moved to enter into communication with the only body in England which undertakes to give a systematic legal education—the Inns of Court.

They have a very competent staff of teachers and lecturers; and I must here explain that the remark quoted by Mr. Harington from my minute is meant to be strictly limited to inferior lecturers. The best substitute for a good legal educational literature—which, as I have said, does not exist in England—is a skilful lecturer or oral teacher; and, if proper arrangements were made, there would be no difficulty in extending, under the superintendence of the Inns of Court, that most valuable portion of a student-servant's English training which consists in attending courts and taking notes of cases.

This system would involve the Secretary of State in some additional expense, but it is abundantly clear, from Mr. Harington's figures, that the Indian Exchequer would save largely on the whole. It would further involve the sacrifice of a principle to which I believe that the Civil Service Commissioners are inclined to adhere—the principle of allowing the young men to prosecute the studies of their year of probation in any part of the country which may be most convenient for them. But bringing the students to London to learn laws and languages well is, at all events, preferable to bringing them to Calcutta, Madras, or Bombay to learn law badly and language not better than at home.

As respects the Madras proposal, I concur in Mr. Harington's suggested reply. It would be ungracious to refuse the moderate sum asked for a Law Lecturer if that part of the scheme stood by itself; but the other branch I regard as thoroughly objectionable. If a new office is created in the courts for the training of students, one of two things will follow:—If the duties are real and actual, the young man will certainly learn, but it will be at the expense of the suitors; if, on the other hand, the duties are nominal, it is absolutely certain that, in the absence of that stimulus which is absolutely needed for work in this country, the execution of the duties will be as merely colourable as the duties themselves.

SMALL CAUSE COURTS

FEBRUARY 22, 1864.

THESE statistics of the Sadr Court at Agra fill me with dismay. While admitting that to some extent they are explained by the papers, I must say that, so far as the figures are concerned, I have seen nothing resembling them except the returns representing the condition of the unreformed Court of Chancery in England nearly a century ago; and on behalf of that English court, whose delays passed into a proverb, I must observe that it had to apply an infinitely more intricate and difficult system of law than the Agra court has to administer, and that it commanded only part of the time of its principal Judge (the Lord Chancellor) and the whole time of only one Judge besides, the Master of the Rolls.

The injustice and demoralisation caused by such a condition of judicial business, however occasioned, are almost beyond conjecture. If the simple consideration be taken into account that in every suit one party or set of parties must, in some sense, be in the right, and another party or group of parties in the wrong, the heavy injury to private interests and morality inflicted by keeping righteous litigants for so enormous a time from the enjoyment of what should be theirs, and maintaining wrongful litigants in the enjoyment or expectation of what should not be theirs, becomes too plain a matter for illustration. But there is a less general consideration, which is of even more importance. It is the habit of the Native mind to look on all litigation as a species of gambling. This peculiarity must be immensely strengthened by these extraordinary delays. The further off the decision in a suit is pushed, the more does it assume the air of a chance. We shall never prevail on the Natives to think that, before they institute a suit, they ought to consider whether they have the right to institute it, until the ultimate decision is brought near enough to be reflected upon.

In this country the most probable result of such an arrearage is a great increase of that widespread immorality which arises from the comparative incapacity of the Natives to associate legal claims with moral rights. In England the conse-

quence would be a general revolt of sentiment against the tribunal which was unfortunate enough to have its files in such a state. Though the English Court of Chancery has been thoroughly reformed and cheapened, and though it administers a law much superior in many respects to the jurisprudence of the Courts of Common Law, it has never overcome the popular disfavour brought upon it by Lord Eldon's dilatoriness; and many important legal rules and proceedings are prevented from becoming universal because they are discredited by association with the Court of Chancery.

I concur in all of Mr. Harington's specific recommendations.

I think that two Benches, each of two temporary Judges, should immediately devote themselves to clearing off the arrears. If our Government in India be good for anything, it ought not to lose a moment in abating so abundant a source of demoralisation. This will involve the appointment of two more temporary Judges.

I think also that a fourth permanent Judge should be nominated, in order that the services of the three existing permanent Judges may be properly utilised. Mr. Harington's observations on this point seem to me conclusive.

It will be well that the Lieutenant Governor be moved to cause the Lower Courts to confine themselves to the spirit of the Code of Civil Procedure in respect of the hearing of original suits. I do not, as will be hereafter seen, think the present distribution of Courts of Appeal and of First Instance a good one; but the system will not be improved by irregular departures from it.

I further concur with Mr. Harington in thinking that, in the face of remonstrances from so many Courts of Appeal, we cannot carry out the recommendation of the Secretary of State as to the disposing of applications for special appeals by a single Judge. It strikes me, too, that the suggestion is made in ignorance of the great change which has recently taken place in the value attached to isolated judicial rulings, since the establishment of the High Courts and the introduction of a better (though still imperfect) system of reporting.

When this reference goes ultimately to the Financial

Department, it is impossible that the largeness of the outlay demanded should not be animadverted upon. I am bound to say that it is not the last claim for additional expenditure on Courts of Appeal and Revision which is destined to come before the Government. The Lieutenant Governor of the Panjáb has made an application for a second Judicial Commissioner, and the criticisms on his proposal which have been received would appear to prove that not only a second, but a third Commissioner is required. As the increase of litigation is proportionate to wealth, and as the province of Oudh is one of the most rapidly advancing portions of British India, the time cannot be far distant when the highest Appeal Court of Oudh will require strengthening.

What I look forward to in these provinces, if no change takes place in the Indian judicial system, is a series of augmentations in the fixed strength of the courts, combined with a series of spasmodic efforts to clear off arrears by the aid of temporary Judges. There is a chronic tendency towards arrears in the Indian Courts of Appeal, from causes which I will presently attempt to describe; and if this tendency is less likely to show itself hereafter in the High Court of Bengal than in other Indian tribunals, it is because those causes are combated, so far as the power of the Court extends, by remedies which, though necessarily inadequate, are yet applied on proper principles.

On the other hand, I am convinced that, if the Indian judicial system were placed on a proper footing, one High Court or Sadr Court would serve for the whole of the North-West, Panjáb, and Oudh, and might exercise a much more effectual and much less teasing and irritating superintendence than that which is now exercised by the three existing Courts of Appeal.

I am bound to give my reasons for this opinion, which reasons are not, as it appears to me, of a kind to be invalidated by my comparative ignorance of the country. I am especially anxious to state that I do not contemplate, on the one hand, the coarse expedient of merely lopping off an appeal here and there, nor on the other hand a mere revision of establishments—that is, a shifting and exchanging of the elements of

which the system is now composed without alteration of principle.

To anybody who is accustomed to the criticism of judicial systems, it becomes evident on very short examination that the Indian system is founded on the assumption of the comparative incompetence of the Judge of First Instance. Every Judge in his degree has somebody placed above him, and sometimes a series of persons, whose office it is to correct his supposed mistakes.

So far as this assumption relates to questions of law, it cannot be called untrue; though it may, in some cases, be incidentally false. Every judicial system ought to be so arranged that each Judge should be more competent to decide questions of law than the Judge below him, and I am not in a position to say that the Indian system is not so arranged. I have, therefore, no quarrel whatever with the form of appeal known as a special appeal. But, so far as the assumption relates to questions of *fact*, I hold it to be a delusion, and based on a false theory of the means of ascertaining truth.

I do not believe that any Judge, of whatever power, patience, and ingenuity, can, when sitting in appeal and removed from actual contact with the witnesses, successfully correct the mistakes of a Judge of First Instance, unless to a very slight degree. Except in physical science, there is no known measure of the truth of facts except the aggregate of the impressions made on the minds of men of average capacity and integrity by the evidence concerning those facts, and of these impressions the most important part is produced by the language and demeanour of the witnesses and by the characteristics of their story, not as it is read on paper but as it falls from their lips. It follows that a Judge of moderate abilities, who is actually in contact with the witnesses, has a far better chance of arriving at truth than a Judge of much higher power who hears the evidence at second-hand, even when that evidence is completely taken on paper. But when, as is, I fear, too often the case in India, the evidence, so far from being completely reported, is taken down with utter carelessness and unintelligence, not only is the Judge of Appeal in no better position for ascertaining truth than the Judge of

First Instance, but his chances of reaching it are far worse. I am quite well aware that many able men in India think that ingenuity and subtlety in the Judge of Appeal will enable him to draw from imperfectly-reported evidence conclusions sounder than the rough impressions of the Native Judge below. I do not question the sincerity of their belief, but I consider that the theory arrived at under such circumstances concerning the facts is in most cases a mere figment of the mind, and that the chances of error, so far from being diminished, are increased in proportion to the ingenuity of the Court of Appeal. I do not say that the incompetent Judge of First Instance is not often in the wrong; but I say that we have no security that the Judge of Appeal is in the right. The first can only err (if we put bad faith aside) from making an ignorant or careless use of real materials, but the errors of the second come from his being compelled to work upon materials which are only imaginary.

However strange or novel these principles may appear in India, they are the foundation of the English system of deciding questions of fact. In the English Courts whose business it is to decide such questions, there is no such thing as a true appeal from the decision of a Judge of First Instance on facts. The finding of a County Court Judge on facts is always taken as conclusive even when the soundness of his decision on a point of law is in question; and, though the verdict of a jury may sometimes be disturbed, the Court of Law never propounds its own view of the facts, but refers the case to a second jury. Indeed, it is only once among a thousand cases that a verdict is set aside as against the weight of evidence; the common cause of disturbing verdicts is some error of law by the Judge who directs the jury.

The doctrine that there is no patent machinery, consisting of rules to guide the mind, by which truth can be extracted from paper evidence is one of the few contributions which scientific jurisprudence owes to English lawyers. Such rules form a large chapter in most Continental systems of law; but the English Law of Evidence, which assumes the existence of a Judge and jury sitting together, has quite a different character. This part of English law (the Law of Evidence) is most

useful to a Judge of First Instance; but it has no application at all, or only the very smallest, to a Court of Appeal. I perceive, with regret, that many Indian Judges of Appeal have formed a wholly erroneous notion of the functions and limits of the English Law of Evidence. The results of their attempting to apply it *in alienâ materiâ* can only be to create confusion worse confounded.

To show that these are not merely speculative theories I will take the liberty of stating how I have seen them tested. In the English Court of Chancery, partly from its having inherited some false principles from Roman law, but chiefly through the anxiety of the court to save the suitors from expense, an Equity Judge, instead of sending a complicated question of fact to a Common Law Court to have it solved by a jury, will sometimes undertake to decide it himself. I have rarely known a Judge to make the attempt without expressing distrust of his own judgment, and I have generally observed that the amount of distrust is in proportion to the ability of the Judge. But it has once or twice happened within my knowledge that a Judge, after beginning the attempt and stating his impression of the facts, has finally abandoned the inquiry in despair and sent the case to a jury. It has been the startling difference of the story as heard from the witnesses from the same story as told on paper, and the conviction forced upon me that the decision of the jury was right and the impressions of the Judge wrong, which have left me without the slightest doubt of the soundness of the principles set forth above.

The practical conclusion which I draw from these principles is that all efforts at Indian law reform should be directed to one end—to the improvement of our Judges of First Instance. Their character and capacity ought to be such that their judgments on questions of fact may be taken by all courts above as conclusive. But it would be a mistake to suppose that I point at a very high standard. Moderate ability would suffice, so far as Judges of First Instance are required to decide on questions of fact; but good sense, good faith, and familiarity with the usages of the people are indispensable.

Such a course of law reform would carry with it the rare combination of diminished expenditure with closer adjustment to principle. So that our efforts and those of the Local Councils and Governments take that direction, I am almost indifferent as to the specific scheme which may command favour. But I think I am bound to say something of two proposals which resemble one another in raising the questions which I have been considering.

One is the proposal referred to in Mr. Harington's Note for the Constitution of Provincial or Divisional Courts, whose decisions, though subject to appeal on points of law, should be conclusive on questions of fact. This plan has the authority of Sir Barnes Peacock and Mr. Harington, and the mention of the Chief Justice's name gives me the opportunity of stating that Sir Barnes Peacock, as I gather from conversations with him, entirely concurs with me on the question of principle just discussed. Nothing can be sounder than the principles on which the scheme of Provincial Courts is based, and it would be a radical remedy for the evils of the Indian judicial system. But then it has the inconveniences of all radical remedies. It would revolutionise all existing arrangements; it would disturb all existing interests; it would raise some very troublesome questions regarding the privileges of the Civil Service; and at first, though certainly not in the long run, it would be very expensive.

Further than this, I must own that I hesitate to express an opinion in favour of any comprehensive scheme of Indian law reform so long as the petty and the great litigation are disposed of by the same machinery. No one can quite say what may be the exact consequence of attempting to mend an engine which has so much work to do. It is well known to English lawyers that law reform was impracticable at home until the County Courts were established; but as soon as the courts at Westminster were lightened of the burden of petty cases, then faults of constitution and procedure became visible and the results of altering them could be foreseen. Then, and not till then, the Common Law Procedure Acts were passed. India is now in the condition from which England has been delivered, and remains the sole example in the

world (so far as my knowledge extends) of a country pretending to a civilised judicial system in which the great and small litigation are dealt with by the same judicial machinery. The only apology I ever heard for this anomaly consisted in the observation that the poor man's cases are as valuable to the poor man as the rich man's cases to the rich man, and that both are entitled to the same securities for justice. I trust I may be pardoned for comparing this argument to the ironical reasoning of the English Judge who defended the former English system of divorce by Act of Parliament on the plea that the law of England knew no distinctions between rich and poor. The truth is, that the faults of the existing Indian system fall with infinitely greater weight on the poor man than on the rich. From the smallness of the sums which he generally has at stake in his cases, the poor man is restricted to the lowest stages of the judicial hierarchy. He is confined to the lowest (and therefore the most incompetent) Judge of First Instance, and to the lowest (and therefore the most incompetent) Judge of Appeal. He is only brought into contact with those parts of our judicial system of which it is too often true that the blind sit in appeal from the blind.

These remarks bring me to the second of those plans which, in my eyes, have at least the merit of being adjusted to true principles—the scheme for the extension of small cause courts. I do not in the least wish to anticipate a discussion which may be more usefully taken up hereafter and elsewhere; but such grave misapprehensions are abroad that I venture to point out very briefly the bearing of the arguments which I have submitted on the question of the establishment of small cause courts.

The essentials in the constitution of a properly-organised small cause court are these—

1*st.*—The comparative superiority of the Judge.

2*nd.*—The limitation of the jurisdiction to a certain class of cases.

3*rd.*—The limitation of the jurisdiction to cases below a certain amount. Of these three ingredients the first two are incomparably the most important. The effect of that characteristic of a small cause court which I have placed second in

order—the limitation of the jurisdiction to cases *belonging to certain specified classes*—is that small cause courts are pre-eminently courts for the trial of facts. I refer to section 3 of Act XLII. of 1860 and section 8 of the Bill for the Improvement of Civil Justice in Suits of Small Value, and beg to observe that it is only in rare instances that cases belonging to the classes there indicated involve questions of law. When they do involve them, the questions are usually of the simplest kind.

When it is once seen that a Small Cause court is mainly a court of fact, and when the superiority of the Judge, the characteristic which I have placed first, is taken into account, I trust it is immediately perceived that the reason for giving no appeal from the Judge of a Small Cause court is not the mere wish to get rid of the appeal. The appeal is discarded because it is not wanted; because it would create injustice and not justice; because it would do harm and not good.

It is true—though much less true of the Mufassal than of England and the presidency towns—that it is sometimes not possible perfectly to eliminate law from fact. The cases to which the jurisdiction of Small Cause courts is limited may occasionally involve questions of law, and hence it is necessary that a Small Cause court Judge should have had a legal training. Otherwise, any man of good sense, good faith, and familiarity with the usages of the people would serve.

The element of a Small Cause court which I placed last in order—the limitation of the jurisdiction to suits below a certain value—is popularly considered the most important of all. It is, in fact, the least important. It is supposed to be designed for the sake of limiting the area of possible injustice, Injustice may occasionally be done by Small Cause courts as by other courts, but I do not hesitate to say that the limitation of the jurisdiction to a small amount is chiefly a concession to popular distrust of a new system. It is invariably found that, when a County Court or Small Cause court has been organised on proper principles and established in a particular locality, a feeling grows up in favour of increasing the amount of its jurisdiction.

The only further remark I have to offer at present is that,

although I hold the Indian system of appeal on facts to be founded mainly on a delusion, I admit it to be important that the delusive nature of the system is not recognised generally in India. Though it may not be possible to correct the blunders of a Munsif, the Munsif himself thinks that it is possible; and thus may, to some extent, be less open to corruption and a shade more careful in his adjudication and in his collection of the evidence. So long as our Judges of First Instance are what they are at present, I would never relieve their decisions on facts from appeal without substituting for the system of appeals a system of rigid supervision

THE KÁTHÍAWÁR STATES AND SOVEREIGNTY

MARCH 22, 1864.

THIS is one of the minutes referred to (supra, p. 36) by Sir Henry Durand, which regulate the relations of the Government of India to those Native chieftains commonly called (in the language of the Middle Ages) 'feudatories,' but more accurately and intelligibly described as rulers to whom a small portion or fragment of sovereignty is reserved, sufficient to enable them to exercise some of the functions of Government.

I concur in the expediency of the arrangement proposed by the Governor General for the affairs of Káthíawár, and it is possible that, if the legal basis on which His Excellency places his proposals were properly explained, I might not dissent from it. But the proposition that territory which is British is not subject to British law does not appear to me to be tenable, and I am certainly of opinion that the Governor General's view is not reconcilable with the view of the Bombay Government. The members of that Government obviously mean to contend that Káthíawár is British territory in the same sense in which the Kónkan is, and if so I think that all the consequences which they contemplate would follow. All laws and regulations which were of general application, and were passed by a competent legislature, would extend to Káthíawár, and a very difficult and complex enactment would be required to place the country under a system adapted to the state of society which prevails in it.

The Foreign Secretary has, it is true, called attention to a provision of the Bombay Regulations which attempts to enact that no territory shall be made subject to the Regulations except by specific Regulations. I do not doubt that this provision was intended to have the effect attributed to it by Colonel Durand, but I consider that it was beyond the powers of the enacting authority. No Indian legislature as constituted in 1827 could shackle the action of the same Indian legislature as constituted in 1828. Impediments to the exercise of the full powers of legislation at any given moment can only be created by some superior legislature.

I am quite conscious of the difficulty of applying international rules and international conceptions in India, but if that difficulty must be faced, my opinion is that the Káthíawár States are in the enjoyment of some measure (although a very limited measure) of sovereignty, and that therefore the territory which they include is properly styled foreign territory. The arguments of the Bombay Government—and, if I may venture to say so, of Mr. Ritchie—seem to me to be vitiated by an imperfect appreciation of the rule laid down by the publicists that the question of sovereignty is, for purposes of international law, pre-eminently a question of fact. It is not enough that a claim to political supremacy might have been asserted; in order that the law of nations may apply, it is necessary that the claim should have been in fact asserted. If this were not so, international law would have to take notice of such pretensions as that of former kings of England to be kings of France, or of the former kings of the two Sicilies to be kings of Cyprus and Jerusalem. Whether the Peishwa or the Gaikwár had really any authority over Káthíawár of such a sort that it was capable of descending to any other Power is a point on which I do not think it necessary to enter, because, whatever were the rights which were inherited by the British Government, those rights have never been actively asserted. On the contrary, it appears to me that they have been distinctly disclaimed. Not only has our whole course of action in Káthíawár been inconsistent with a claim to absolute sovereignty, but the Court of Directors made a declaration in 1830 which appears to me to have con-

clusively disposed of any such claim. The Court of Directors was perfectly competent to disclaim sovereignty over Káthíawár, and it did disclaim it. Sovereignty being a question of fact, this declaration, being an admission against the interest of the declaring party, is evidence virtually irresistible. Nor do I think that this declaration can be recalled by any existing authority, whether it be the Government of India or the Secretary of State in Council. On the assumption that international rules in some sense or other apply to the case, it is not competent to a State, after admitting by an organ capable of representing it that a neighbour is sovereign, to turn round suddenly and allege that the admission was all a mistake. It is conclusively bound by its declaration until a new state of things arises through war or treaty.

But, although these seem to me to be the principles which apply to the relations between Káthíawár and the British Government, it does not at all follow that the Government of India is precluded from carrying out in Káthíawár the arrangements suggested by the Governor General. I quite agree with Mr. Harington that the analogy which governs the case is that of the old demi-sovereign States in Europe, and I think that a portion of sovereignty over Káthíawár, sufficient to warrant us in interfering for the good order of society and the well-being of the people, is lodged with the British Government.

Sovereignty is a term which, in international law, indicates a well-ascertained assemblage of separate powers or privileges. The rights which form part of the aggregate are specifically named by the publicists, who distinguish them as the right to make war and peace, the right to administer civil and criminal justice, the right to legislate, and so forth. A sovereign who possesses the whole of this aggregate of rights is called an *independent* sovereign, but there is not, nor has there ever been, anything in international law to prevent some of those rights being lodged with one possessor and some with another. Sovereignty has always been regarded as divisible. Part of the sovereignty over those demi-sovereign States in Germany which were put an end to by the Confederation of the Rhine resided with the Emperor of Germany ; part belonged to the

States themselves. So also a portion of the sovereignty over the States which make up the present German Confederation belongs to that Confederation. Again, the relation of the Swiss Cantons to the Federal Power was, until the events of 1847 and 1848, a relation of imperfect sovereignty; and though at this moment it is dangerous to speak of the North American States, the relation of the several members of the Union to the Federal authority was, until recently, supposed to be of the same nature. In point of fact, Europe was at one time full of imperfectly-sovereign States, although the current of events has for centuries set towards their aggregation into large independent monarchies. It may be further mentioned that, down to the dissolution of the German Empire, the Emperor of Germany claimed theoretically to be sole, absolute, or (as it would now be called) independent sovereign in Europe.

It may perhaps be worth observing that, according to the more precise language of modern publicists, 'sovereignty' is divisible but 'independence' is not. Although the expression 'partial independence' may be popularly used, it is technically incorrect. Accordingly, there may be found in India every shade and variety of sovereignty, but there is only one independent sovereign, the British Government. My reason for offering a remark which may perhaps appear pedantic is that the Indian Government seems to me to have occasionally exposed itself to misconstruction by admitting or denying the independence of particular States, when in fact it meant to speak of their sovereignty.

The mode or degree in which sovereignty is distributed between the British Government and any given Native State is always a question of fact, which has to be separately decided in each case, and to which no general rules apply. In the more considerable instances, there is always some treaty, engagement or sunnud, to guide us to a conclusion, and then the only question which remains is, what has become of the sovereign rights which are *not* mentioned in the convention? Did the British Government reserve them to itself, or did it intend to leave the native power in the enjoyment of them? In the case of Káthíawár the few ambiguous

documents which bear on the matter seem to me to point to no certain result, and I consider that the distribution of the sovereignty can only be collected from the *de facto* relations of these States with the British Government—from the course of action which has been followed by this Government towards them. Though we have to interpret this evidence ourselves, it is in itself perfectly legitimate.

It appears to me, therefore, that the Káthíawár States have been permitted to enjoy several sovereign rights, of which the principal—and it is a well-known right of sovereignty—is immunity from foreign laws. Their chiefs have also been allowed to exercise (within limits) civil and criminal jurisdiction, and several of them have been in the exercise of a very marked (though minor) sovereign right—the right to coin money. But far the largest part of the sovereignty has obviously resided in practice with the British Government, and among the rights which it has exercised appears to me to be an almost unlimited right of interference for the better order of the States. I mean that, if the interferences which have already taken place be referred to principles, those principles would justify any amount of interposition, so long as we interpose in good faith for the advantage of the chiefs and people of Káthíawár, and so long as we do not disturb the only unqualified sovereign right which these States appear to possess—the right to immunity from foreign laws.

I think, therefore, that the actual state of the sovereignty over Káthíawár affords a legal basis for the Governor General's plan. But even if I were compelled to admit that the Káthíawár States are entitled to a larger measure of sovereignty, I should still be prepared to maintain that the Government of India would be justified in interfering to the extent contemplated by the Governor General. There does not seem to me to be the smallest doubt that, if a group of little independent States in the middle of Europe were hastening to utter anarchy, as these Káthíawár States are hastening, the greater Powers would never hesitate to interfere for their settlement and pacification in spite of their theoretical independence. If anybody objected to the proceeding, it would be because some motive of self-aggrandisement was sus-

pected. But the motives of the Government of India in effecting an arrangement of the affairs of Káthíawár are above suspicion, and the course which it is proposed that we should take has its justification, not only in the indefinite obligations contracted by us in the capacity of Paramount Power, but in the fact, adverted to by Colonel Durand, that our government of India has, in a sense, been the cause of this anarchy in Káthíawár. One of the many difficulties attending the application of international law in India arises from the circumstance that the whole system of the law of nations was framed by its authors subject to the contingency of occasional war. The British Government has prevented the Káthíawár States from going to war among themselves, and hence has arrested the operation of a natural process by which the endless sub-division of the chiefships occasioned by the law of succession would have been corrected or counteracted.

It is conceded on all hands that Bhaunagar is British territory. Legislation will therefore be needed in all probability to bring it under a system in any degree resembling that adopted for the foreign States in Káthíawár.

THE EDUCATIONAL SERVICE

MAY 12, 1864.

IF the Secretary of State recognises the expediency of removing or mitigating the many disadvantages under which the Educational Service is placed, but at the same time prefers one general scheme for all India to a number of local schemes, I think he is in a much better position for forming such a plan than we are. Most of the materials for a conclusion are in England, not in India, for the point to be ascertained is what amount of encouragement is necessary to induce a certain class of young men in England to make the experiment of entering this service. The Secretary of State, it will be remembered, has just informed us that the selection of Educational Officers for India must be left entirely in his hands.

I hesitate to decide between Mr. Howard's plan and Mr.

Atkinson's.[1] The former, no doubt, adds certainty to other inducements as a reason for enlisting in the service, but we must not leave out of consideration Mr. Atkinson's statement that men occasionally come out whom it is worth paying to go home again. Certainty can be no advantage here if it tends to keep such men in the country.

For my part, I see no objection to having two or three local systems in operation at once. The class interested is, after all, but small, and we know too little of the motives which induce its members to come here or stay here for us to be able to pronounce confidently whether this or that mode of dealing with it is the best. If one plan proves in practice more effectual than another, we can then generalise it.

I would, therefore, recommend Mr. Atkinson's scheme to the Secretary of State, without prejudice to Mr. Howard's.

I am strongly impressed with the necessity of our improving both the pecuniary and the social position of the Educational Service. In their present condition of unmitigated discontent, they are becoming almost a dangerous class. An order of Government servants at once underpaid and malcontent, and highly educated and cultivated, seems to me an element not to be lightly introduced into Indian society. It is abundantly evident that the whole journalistic opposition to the Government in some parts of India has fallen into the hands of educational officers, and a most effective opposition it is.

That the members of the Educational Service are humiliated by their relative inferiority in rank to the Civil Service I know to be a fact, nor do I think that Mr. Bayley's remark as to the two classes being distinguished by the different motives which bring them to India is well founded. Judging from my own experience, I should say that whether a young man at the Universities competes for the Civil Service or enters the Educational Service is more a matter of accident than anything else. The great cause which deters University men from the competition for the Civil Service is that they are practically obliged to choose between the

[1] Mr. E. J. Howard was then Director of Public Instruction in the Bombay Presidency. Mr. Atkinson held the corresponding post in the Lower Provinces of Bengal.

competition and an University degree. The majority prefer the latter, and afterwards, either from finding the difficulties of getting on in life greater than they expected, or from a wish to marry, a certain number of this majority turn their attention again to an Indian career, which is now only open through the Educational, or, perhaps, the Financial Department. So far as the Universities are concerned, it cannot by any means be said that the men who join the Educational Department are in any way inferior in intellect or energy to those who enter the Civil Service. I would certainly move the Secretary of State to revise the relative rank of the two services.

That University men—or, at all events, highly-educated men—are to be preferred to all others for the Educational Department I have no sort of doubt, at least as regards Bengal. The only alternative to them is the certificated schoolmaster class, which has universally proved, I believe, a failure. Whatever be their defects, the Bengálís have just that sort of intellect which rapidly finds out a man who has been taught to teach by rule in a Normal school, and indeed their whole intellectual cast is such that a highly-cultivated mind is necessary to deal with them and to win their respect.

CIVIL LIABILITY OF MILITARY OFFICERS[1]

OCTOBER 19, 1866.

MY own personal belief is, that the three suits recently instituted by Captain Jervis against his Excellency Sir William Mansfield[2] for money due on a building account, for a general balance of account, and for defamation, were wholly frivolous and vexatious, and that they were intended partly to prevent an exercise of military authority (which indeed was the reason assigned for their withdrawal) and partly to give colour to certain allegations made by the plaintiff in his defence before the court-martial which has just closed its sittings. I know as a fact that the documents filed in those suits contained many statements falling under the grossest forms of

[1] See now the Army Act, 1881, sec. 170.
[2] Afterwards Lord Sandhurst.

what is technically known to English lawyers as 'scandal and impertinence.' Further, I feel very strongly the force of some of his Excellency's general remarks on the injury which may result to military discipline from abuse of the machinery of the civil courts. The risk of such abuse appears to me to be growing in India, and I admit it to be a risk with which commanding officers are little able to cope, and against which they ought not to be called upon to struggle.

It is therefore with some regret that I feel myself compelled to say that the plan submitted to us by his Excellency is, in my judgment, impracticable.

His Excellency suggests that 'the Commander-in-Chief of the several presidencies and commanding officers generally shall not be liable to be sued by officers on the full pay of Her Majesty's service serving in India, or by officers on half-pay employed on the staff, or by warrant officers, Native officers, non-commissioned officers, and soldiers, British and Native, and subordinates attached to the staff or regiments who may not be enlisted under the command of the said Commander-in-Chief or commanding officer.' I imagine that, though his Excellency does not distinctly suggest this, he would consider that a necessary supplement to his scheme would be some formally organised body, a Court of Honour or Equity, to which the disputes which the civil courts would be prohibited from entertaining might be referred.

This proposal falls in with what is no doubt the popular idea of litigation; that it involves a plaintiff and defendant distinctly opposed to one another, and also that it involves a contest in which there is some clear moral right on one side or the other. But it may safely be asserted that probably the largest, and certainly the most important, kinds of litigation do not present these characteristics. In the great majority of the cases tried by civil courts on their Equity side, and in the exercise of the extraordinary jurisdictions conferred on them by statute, there are either no plaintiffs and no defendants, or the parties are arranged as plaintiffs and defendants according to technical rules which do not always or generally represent their real antagonism. Now, it is indisputable that every contentious proceeding may be

incidentally and occasionally employed by an unscrupulous opponent to prevent an exercise of military authority, just as two of the suits in which Sir W. Mansfield was made defendant had not apparently upon the face of them any connection with his position as head of the army in India. Hence, in order fully to carry out his Excellency's proposal, it would be necessary to prohibit by very sweeping provisions all litigious disputes between commanding officers and their subordinates. Very great and very far-reaching injustice would, however, be the probable result. If a colonel and a lieutenant have the misfortune to be shareholders in an insolvent joint-stock company, it would seem highly unreasonable to prevent the subaltern from seeking to bring his commanding officer on the list of contributors. Again, in the class of cases which occupy most of the time of Equity courts—disputes on doubtful wills—a subordinate who happened to be residuary legatee could not justly be precluded from trying to avoid an ambiguous specific bequest to his commanding officer. Yet it would be hardly possible to use legislative language at once sufficiently general, and yet not pregnant with these consequences. Nor would the injustice probably be confined to the officers or others to whom litigation was expressly forbidden. A sweeping statutory prohibition of litigation between persons belonging to a particular class would have extensive effect in vitiating judicial proceedings, and might compromise the interests of many who are wholly beyond the sphere of military discipline.

I feel sure, moreover, that his Excellency's proposal would work considerable and very unnecessary injustice, even were it confined to that class of cases in which there is a distinct issue between plaintiff and defendant. A very simple example is that of a dispute respecting the purchase or joint occupation of a house.

I know no more difficult questions of land law than those which, in the absence of a civil code, are likely to arise concerning immovable property in the Indian Mufassal, and it would be very unfair to compel military men to submit such questions, which constantly involve neither moral right nor moral wrong, to a court whose decision would be a business

of guess-work. The risk of injustice would hardly be less in the application of his Excellency's scheme to the class of disputes which are probably more immediately in his mind—disputes on contracts. One of the suits recently brought against his Excellency hinged upon a building contract; and it happened that the contract was one which should have put the plaintiff out of court at once. But building contracts as a class are notoriously difficult to construe, and so are most contracts which are not framed by experts, but drawn up by the agreeing parties themselves; and this, I presume, is the usual practice in India.

If I am right in supposing that a necessary part of His Excellency's plan would be a Court of Honour, with some sort of formal organisation, I am convinced its working would be unsatisfactory. My experience of unlearned tribunals is, that they either decide at haphazard or are ultra-technical. If it should be sought to neutralise these defects by allowing advocates to be heard by the court (and I really do not see how they could be kept out), it seems to me that the very liability of commanding officers to annoyance of which his Excellency complains, and which I concur with him in thinking a great evil, would be very likely to be reproduced, and in a far more embarrassing form.

Since, however, I have admitted the evil to which his Excellency's Minute calls attention to be both serious and increasing, it would be very improper in me if I did not endeavour to discover and point out some expedient by which it may be mitigated, if not removed. And here it is important to inquire what the actual state of the law is as to the civil liability of commanding officers.

The law of England, which the Indian courts would (until a Civil Code provides otherwise) certainly apply to such cases, has long been that an officer is not civilly liable for acts done in the exercise of military authority. But the rule was until lately supposed to be subject to the qualification that the acts must not have been done *maliciously*: and so it was laid down in an opinion recently received from the Advocate General. The loophole was dangerous, as letting in an inquiry as to motives. But Mr. Cowie had probably not

observed that within the last few months the supposed qualification had been removed by a dictum of a learned Judge. Mr. Justice Willes, one of the ablest and most authoritative lawyers on the English Bench, has publicly laid down that if, in an action before him against an officer for alleged improper exercise of military authority, there should be evidence of malicious intent, he should still, if the act were shown to be military, direct the jury to find a verdict for the defendant.[1] I cannot doubt that the strong and pointed language in which this dictum was clothed was expressly intended to reassure military officers in England who have recently been much harassed by litigation such as that of which his Excellency complains. The law has therefore now for its basis the doctrine that every military man has bound himself by a 'peculiar contract,' to use Mr. Justice Willes's expression, which absolutely confines him to military remedies for the redress of military wrongs.

Such is the law. Recourse to the courts is not absolutely barred, for there may still be an inquiry whether the act complained of was really done in the exercise of military authority, but if the act is shown to have been, or to have purported to be, military, the principle of decision is now clear. It may, however, be said that the very power of suing may be used as an engine of annoyance, since the real object of the suit may be disguised until the judicial inquiry above mentioned has revealed its true character, and since scandalous and defamatory matter may be introduced into the pleadings, I allow that officers may be temporarily harassed by the first expedient, though it is one of which the consequences must always be ultimately serious to the plaintiff; but the second is one little to be feared under a well-arranged system of administering civil justice.

There is no offence against itself which a court, sensible of its duty and dignity, so deeply resents, and none which so prepossesses it against a plaintiff, as the attempt to employ its procedure to inflict collateral injury on a defendant. It does not appear to me that the rules of procedure observed by

[1] See now *Dawkins* v. *Lord Rokeby*, 4 F. & F. 806, 832, 833, and Pollock's *Law of Torts*, 2nd ed. p. 237.

Indian courts, if such rules be considered by themselves, give defendants less protection against such injury than do the analogous rules followed in England. Section 124 of the Code of Civil Procedure[1] gives the court a very large power of rejecting any 'written statement' (which is the part of the pleadings into which scandalous allegations would be foisted) if it shall be of opinion that the statement contains 'matter irrelevant to the suit,' and when such rejection has taken place, the party cannot present a fresh written statement without the express permission of the Judge. No doubt, the Judge would allow any allegation, even if *primâ facie* scandalous, to be retained which the plaintiff affirmed to be true and essential to the merits of his case. But in so affirming the plaintiff would bring himself under the provisions of section 24, which imposes the penalties of fabricating false evidence on everybody who includes in a written statement averments 'which he knows or believes to be false, or which he does not know or believe to be true.'

Let us suppose the three suits instituted against Sir William Mansfield to have been brought before a court fully conscious of its own responsibilities. The suit for defamation of character was one of which, as the Advocate General has remarked, very short work would have been made. It amounted in a lawyer's eyes to the legal monstrosity of a suit for alleged defamation in which the plaintiff, while he distinctly defamed the defendant, omitted to set forth the defamatory matter of which he himself complained. Whether such a suit ought to have been received at all I am unable to say, since I am unfamiliar with the procedure which obtained in the Panjáb before the introduction of the Code a few weeks ago. But I cannot imagine that Mr. Cowie was wrong in supposing that it would have been the duty of any court to take it off the file on the motion of the defendant, and thus the plaintiff would, at the very least, have been under the necessity of paying twice over his very heavy stamps and talabána.[2] As to the other two suits, there was nothing in their ostensible object to prevent their being tried in regular course, but a

[1] Act VIII. of 1859. So now the Civil Procedure Code of 1882, sec. 116.

[2] Fees to subordinate officers for serving processes or issuing summonses or writs.

competent court would have caused any scandalous matter to be removed, and the very attempt to introduce such matter would inevitably have led it to view the whole litigation with suspicion, to watch it carefully, and to sanction all reasonable steps for bringing it promptly to a close.

Whence, then, arises the peculiar risk of annoyance to which I admit that military officers in India are exposed? I think it arises from the weakness of the inferior civil courts in the Mufassal. I hope I am not using language of unnecessary disparagement. I am not speaking of want of ability in the officers presiding over those courts, or even of want of judicial ability. I refer to a certain lack of moral firmness which I hear of in all quarters. The source of the defect, which perhaps may one day disappear, is not far to seek. There has of late been a great spread of advocacy over India, and the lower courts have not yet fully learned (though some have learned more than others) to curb the excesses into which it is sure to fall unless controlled either by the firm hand of a Judge, or by the stern rules which govern the practice of the English Bar. It is hardly wonderful that an Indian Mufassal advocate should not only permit himself in court a licence with which even the vulgarest notions of an English barrister's liberty have no sort of correspondence, but should occasionally not hesitate to defend his own case and attack that of his opponent in the newspapers, when one considers that he is guided by no definite code of practice, and that he has almost invariably a pecuniary interest in the result of his case. At all events, a great amount of concurrent testimony has for some time past been reaching me that Indian civil courts (apart from the High and Chief Courts) are to a pitiable degree at the mercy of sophistry and effrontery, and are most unduly sensitive to the public opinion brought to bear on them from outside. Such defects must obviously, and very seriously, diminish those safeguards against the abuse of Civil Procedure which I have described above, while they add opportunities of annoyance which would never be found in proceedings before a strong and firm Judge. And then, beyond all this, there is that vast machinery of appeal which presses on the litigant throughout India, but

nowhere so heavily as in the Panjáb, and which, essential as it may be to the dispensation of justice in the ordinary run of cases, would almost seem carefully framed to arm a deliberately vexatious litigant with a hundred-fold power of vexation.

The liability of military men to this special danger has obviously attracted the attention of the framers of the Mutiny Act, since it can hardly be doubted that section 88 (of the Act of 1865) is directed against it; and I think that it is only through an accident that the provision has failed of effect. The section in its last clause provides that 'every action against any person for anything done in pursuance of this Act (which includes all Mutiny Acts, all lawful military action depending on the Mutiny Acts, or on articles made under them) shall be brought in some one of the Courts of Record at Westminster, or in Dublin, *or in India*, or in the Court of Session in Scotland.' This expression, 'Court of Record,' applied to the Courts of Westminster and Dublin, practically confines the power of suit to the highest tribunals in the country; and I am inclined to suspect that the framers of the section supposed that it would have analogous effect in India, and that the actions referred to were only intended to be brought in the old Supreme Court or present High Courts. I entertain this suspicion the more strongly because in certain former states of the law in India, I much doubt whether an Indian Mufassal court would have been held to be a Court of Record. But now the better opinion, grounded on technical reasons on which it is unnecessary to dilate, is that every civil court in India, even a Small Cause court, is a Court of Record.

The very simple proposal, therefore, which I now make is that we attempt to have effect given to what I cannot doubt is the general intention of this section, whether I am right or wrong as to its special intention. I suggest that the Secretary of State be moved to obtain through the War Office such an alteration of the 88th section of the Mutiny Act as will place commanding officers in India on the same footing in respect of civil liability for acts done in the exercise of military authority, as commanding officers serving in England, Ireland, or Scotland. Under the amended section

actions of the kind which the section defines, founded on a cause of action arising in the parts of India possessing a High Court established by the Queen's Letters Patent, or a Chief Court, or a Recorder's Court, would only be brought to such Court; but as the High Court of the North-Western Provinces and the Chief Court of the Panjáb have no ordinary original jurisdiction, it will be necessary to introduce words giving them such jurisdiction for the purpose of trying such actions; and it must further be provided that, if a suit against a commanding officer be instituted in a court subordinate to the High or Chief Court, and a *primâ facie* case be made out that such suit is brought on an act done in the exercise of military authority, it shall be the duty of the High or Chief Court to transfer the case, and try it as a Court of Extraordinary Original Jurisdiction.

Such provisions would not apply to provinces in which there is no High Court or Chief Court or Recorder's Court, and thus if the legislative change were to be absolutely complete, such territories as Oudh, the Central Provinces, Sindh, &c., would have to be brought under the jurisdiction of High or Chief Courts to the extent necessary for trying such suits; but I think it would be better to avoid this complication, and in the territories just mentioned to leave the law as it stands. Even thus the evil to which our attention has been directed, and which I think very formidable, would be very sensibly mitigated.

If my colleagues assent to the proposed amendment, I will prepare in the Legislative Department a clause which will carry out the intention I have indicated, and which can be at once added to section 88 of the Mutiny Bill of 1867.

MR. PRINSEP'S PANJÁB THEORIES

OCTOBER 26, 1866.

THIS is, I must say, one of those proposals which are calculated to drive to despair any member of the Government of India who has joined that Government straight from England. The facts are these:—Eighteen or nineteen years ago the settlement of the land-revenue of the Panjáb, then just brought

under British rule, was effected, and, as is usual in India, the status of the various classes of proprietors, sub-proprietors, and tenants was ascertained. Within the last two years Mr. Prinsep, the Panjáb Settlement Commissioner, has had a sort of roving commission under which he has assembled juries, if they may so be called, of the cultivating classes, and by their help he conceives himself to have discovered that serious mistakes were made in the recording of rights at the last settlement. Colonel Lake, however, the Financial Commissioner, who appears to have gone over the same ground with Mr. Prinsep, questions some of his most important results. The Lieutenant Governor, Sir Donald Macleod, differs in some particulars both from Mr. Prinsep and Colonel Lake. The Viceroy dissents to some extent from all three, and so does the Foreign Secretary, Mr. Muir.[1] Now, we know that nobody connected with the Government has had experience of the country, as regards actual contact with the land and commerce with the people, which can be compared with that of Mr. Muir and the Governor General. Sir Donald Macleod—I quote Mr. Grey—'has studied and observed the natives of India with more acuteness and accuracy probably than most public men in this country.' Mr. Prinsep 'possesses special qualifications' for his inquiry. Colonel Lake finally is described by the Lieutenant Governor as 'the most thoughtful perhaps, and free from prejudices, of all the officers who have adorned this administration.' I do not in the least deny the justice of these compliments, but I need scarcely point out the difficulties they place in the way of those who must decide the point mainly by evidence and authority.

There is further this element of suspicion—of course I do not use the word in any injurious sense—which pervades the materials for an opinion. The old settlement reflected the ideas on the subject of property and tenant-right which were then all but universal in India, and which nobody of much credit denied. Mr. Prinsep's discoveries, on the other hand, and the proposals of Sir D. Macleod fall in with the views which have recently become prevalent, which have the support of the great European interests in Lower Bengal, and

[1] Now Sir William Muir.

which have been advocated of late with so much tenacity and vigour by Sir C. Wingfield in Oudh. The accusation that an opponent is governed by theory and sees the facts through the prejudices which that theory creates is common to both schools. But this is not all. Sir D. Macleod tells us that 'the state of things existing in the Panjáb for a long series of years preceding annexation was such as almost to extinguish proprietary rights in land, or at all events to deprive them of nearly all their value. The people in consequence possessed but very indistinct ideas in regard to these rights, so that the best security for a correct ascertainment of the rights and relations of the several classes connected with the land is wanting.' The same statement, with fewer qualifications, is repeated several times by the subordinate officers whose opinions appear in the papers. The truth appears to be that when Mr. Prinsep proposes to redistribute these rights, he proposes to redistribute something which is exclusively the product of British rule in the Panjáb. The rights are nothing without the enjoyment which they carry with them, and this enjoyment it is proposed to take away from somebody who now has it, and to give it to somebody else. When I was in the Panjáb in 1864, a very high authority told me that whenever he questioned a person of the Sikh cultivating classes about rights of property previous to annexation, the answer was, 'Why do you ask me such a question? It is you who have created property.' Yet if British rule created the property, I cannot see that it has very deeply sinned if it decided somewhat arbitrarily who was to have it. I should say that we should commit an injustice far more deeply felt if we took it away from those who have enjoyed it for fifteen or twenty years—no very short period, as compared with the whole duration of British empire in India. The transfer of property has, moreover, to be effected in the face of Colonel Lake's statement that when he followed in Mr. Prinsep's footsteps he found nobody discontented with existing arrangements. Colonel Lake further remarks—and this is exactly what I should have expected—that the European officer appeared to have been a good deal more interested in the inquiry than the people themselves. While, then, I concur with Colonel Durand

in thinking that the existing arrangements should not be disturbed, I cannot agree with him in attaching any extraordinary importance to Mr. Prinsep's results. What, in fact, did Mr. Prinsep do? He interrogated a number of very ignorant men about some most intricate rights which are admitted to have been in abeyance for fifteen, eighteen, or nineteen years, and which, if they existed, are admitted to have had no value. No doubt the poor and ignorant of all countries are occasionally the best authorities on matters of usage and custom, but this is on condition that the usage and custom are of practical interest to them, and mixed up with their every-day life. An English agricultural labourer sometimes evinces a singular knowledge of his rights under the Law of Pauper Settlement, which is by no means an easy branch of English law; but he certainly could never state what the law on the subject was twenty years ago. Yet the Law of Pauper Settlement has been, through all his life, I am sorry to say, a subject of the utmost moment to the English labourer.

Nobody brought to India a stronger conviction than I did of the policy of abandoning all English or European generalisations in India, and of respecting Native usage even though it should be unreasonable. And if there was one class of usages which I should have supposed more deserving of respect than another, it was the custom which constitutes the tenure of land. But while nothing seems to me to exceed the tenacity of the Natives of India in adhering to personal, family, and religious usages, and to those customs of holding property which are closely implicated with family relations, such as joint ownership and joint occupation, I must say that I have come to the conclusion, however presumptuous it may be, that there is a vast deal less of actual custom regulating the tenure of land by the cultivating classes than the large assumptions of the Indian Revenue Law on the subject of custom would lead one to suppose. If, indeed, the Native Governments which we succeeded were such that their indiscriminate taxation made no practical distinction possible between rents and imposts, property and tenancy, beneficial occupancy and rack-rent, indistinctness of usage would seem to be the natural result of their system. I do not indeed

impute to any of the schools of Indian administrators which have affirmed the possibility of discovering Native usage on all subjects that they are merely theorising gratuitously—least of all to that school which asserts that ownership is everywhere in India limited by beneficial occupancy—because such a theory could by no possibility have suggested itself to a person under the dominion of merely European ideas and experiences. But I must say that there is now great reason to believe that the doctrines of all schools are founded on partial observation, and that it is the indistinctness of usage throughout India, taken as a whole, which has tempted and enabled the partisans of each school in turn to attribute to its principles this character of universality. At all events, this is the only way in which the conflict of authority can be explained consistently with the reputation of the disputants. I will even assert the necessity of this explanation in interpreting the evidence which the Oudh inquiry produced. However conclusive it may seem to be, I cannot forget that my late colleague Sir H. Harington served in a district of the North-Western Provinces just severed from Oudh, and he steadfastly maintained that he had found beneficial rights of occupancy existing there. And I doubt whether I ever knew a man more careful in detail and patient in observation than Sir H. Harington.

In the existing state of authority and opinion I can see no rule to follow, except to abide by actual arrangements, whether founded or not on an original misconstruction of Native usage. I say, *Let us stand even by our mistakes. It is better than perpetual meddling.* I am therefore entirely opposed to the present proposals, and also to the amendments of Act X. of 1859 proposed by Mr. Muir. And nobody would have opposed more strongly than I any disturbance of Lord Canning's taluqdárí arrangements in Oudh, if only I could have persuaded myself that I understood what Lord Canning intended in respect of tenant right and sub-proprietary right.

I must add that I do not admit the correctness of many of Sir D. Macleod's remarks as to the analogy between beneficial occupancy and English copyhold. There is not the smallest reason for believing that copyhold was an objection-

able form of tenure so long as the copyholders were for the most part actual cultivators of the soil; on the contrary, I venture to say that, in the legal or general literature of 150 years since, it will be found spoken of invariably with respect. But the great rise in the value of land at the end of the last century caused even land of copyhold tenure to become a merchantable commodity, and no doubt the incidents of the tenure are such as to render copyholds an inconvenient investment or form of property. Though property in the Panjáb is very different from what it was under the Sikh rule, it would be absurd to compare it with landed property in England. If the machinery of the Copyhold Commission—which, I should observe, is very cumbrous and tedious, and very little applicable to India—is to be employed anywhere for the extinction of tenant-right, it ought to be first employed in Lower Bengal, where, owing to the existence of great capitalist industries, there really are strong reasons for rendering land as marketable as possible; but it seems to me pedantry to apply it to the Panjáb.

If beneficial occupancy in the Panjáb, as it exists at the present moment, is to be abolished or limited at all, such abolition or limitation can only be justified on Mr. Prinsep's grounds. But I should feel much safer in applying the most sweeping theory of the great European thinkers on political economy, or the most hurried generalisation of great Indian administrators, than in acting on the opinion of ignorant and puzzled peasants on difficult questions in which they have never had a practical interest. We may, at all events, be sure that amid the accumulated wealth which is the product of the peace and security flowing from our rule, all classes connected with the soil are immeasurably better off than they were under Native Governments, and are more than compensated for any errors we may have committed in the mere adjustment of their mutual rights.

See Mr. Maine's speech on the Panjáb Tenancy Bill, above, pp. 268–285

IRRIGATION-WORKS AND RAILWAYS

NOVEMBER 8, 1866.

IN expressing my full concurrence with Sir William Mansfield's conclusion that irrigation works should be constructed by the Government, while railways should be committed to the enterprise of joint-stock companies, I may be permitted to say that I do so on the distinct assumption that the permission recently accorded to us by the Secretary of State, to raise a loan for works of irrigation, will not be withdrawn or seriously modified.

2. I make this reservation because I cannot but feel that the effect of the last discussion which took place, as to the agency to be employed in creating and extending irrigational works, has been to expose the Government of India to much misconstruction. Almost exactly three years ago, there being about three millions sterling to spare from the cash balances, and the Home Government having sanctioned the expenditure of part of the surplus in reproductive public works, the late Earl of Elgin initiated a discussion on the question whether works of irrigation were best committed to the agency of Government or to that of joint-stock companies. The conclusion of the whole Government of India, as then constituted, with the qualified exception of Sir Charles Trevelyan, coincided with that of all the members of the Government of Bombay, of our most experienced engineer and revenue officers, and of Lord Elgin's successor, in giving the preference to Government agency. But shortly afterwards the excess of the cash balance was diverted to another purpose. I am not for a moment disputing the wisdom of the measure from a financial point of view, but the English criticisms elicited by the deplorable famine in Orissa show that our character has seriously suffered by it. A discussion, having an eminently practical object, a discussion of the class of public works to which a considerable fund ready in hand had best be devoted, has assumed the appearance of a purely speculative controversy, begun in the face of dangers which are always imminent in India, and, possibly, intended as a pretext to cover carelessness or irresolution. It is, therefore, most important

to us that the financial point should be taken as settled once for all.

3. Making, then, the above assumption, and, further, making the admission that it would be almost criminal to reject the agency of joint-stock companies unless we are prepared to direct all our energies to the prompt construction of irrigational works, I adhere to the opinion that this class of public works is the last which the Government should allow to pass out of its own hands. I have carefully read all that has been written in India in condemnation of the conclusion arrived at by Government; but the fairest of the adverse criticisms directed against it seem rather to strengthen it than otherwise. It being admitted that the dangers indicated in the Government Minutes are real and not imaginary, certain conditions in the contracts with the existing irrigation companies have been specified as neutralising them. But these conditions seem to me exactly those which deprive the undertaking on which they are imposed of the characteristic advantages of private enterprise.

4. With regard to the proposed extension of the Indian railways, the Minutes of the Viceroy, of the Governor of Bombay, and of the members of their respective councils suggest several questions—at what pace, and in what order, the new railways shall be made; whether they shall be constructed by the Government or by joint-stock companies, and, in the last alternative, whether they shall be committed to companies under the system of guaranteed interest, or on any other principle.

5. Putting aside for awhile the questions of pace and order, I fully adopt the opinion of the Commander-in-Chief, that, of all public works, railways should be the first given up to joint-stock companies, inasmuch as their agency is, in this case, not only not inferior, but, on the whole, much superior to that of Government. The considerations urged by His Excellency in his powerful Minute are, I think, nearly summed up in the proposition that money subscribed by a joint-stock company for the construction of a railway is carried to a separate account and never diverted from it. Now, Governments are under peculiar temptations which render it extremely

difficult for them to keep available funds to such an account, or to continue supplying fresh funds which may be carried to it—a point illustrated by the perpetual encroachments of European Governments on the sinking funds set apart for the extinction of their public debt. Everybody will agree that, abstractedly, there may always be emergencies which could justify Governments in appropriating to general purposes money borrowed for special objects, or in discontinuing loans for special ends with the view of borrowing for general purposes. War in Europe and mutiny in India would always be considered such emergencies. But apart from such extreme cases, there are many influences at work on a Government like this which tend either to arrest the process of borrowing for railway construction, or, if borrowing be continued, to continue it for other objects. One financier is eager to show a surplus, and in his unwillingness to add to the annual charge for interest on debt is easily persuaded that railways have gone far enough. Another feels that a perpetually borrowing Government, whatever reasons it may assign for its policy, is never in good credit. Or, again, some previously unknown or temporary cause may elevate a different class of public works into the importance which irrigation works have recently assumed, and the simplest way of meeting the sudden necessity will be the contraction of expenditure on railways. No amount of determination in the Government, as constituted at any given time; no degree of positiveness in publicly stating an intention, can afford such security for the prosecution and completion of a line of railway as is given by its concession to a company. Every one of us will admit, I presume, that, but for public companies, we should not have had the present Indian railways; and there is much even in the present discussion which may lead us to doubt whether, if we undertake to construct the remaining lines, they will ever be constructed.

6. It may be added that the moral effect of borrowing through companies, and borrowing directly for public works, is by no means the same. I believe that a good deal of harm is acknowledged to have been done to the East India Company, even before the mutiny, by the accusation that it

was a perpetually borrowing Government. The defence made for it always was, that it borrowed for the purpose of investment in public works; but the apology, though true, did not exclude some degree of discredit. On the other hand, the immense loans virtually raised for railways are not believed to have in any way affected the Company's credit.

7. Of the disadvantages involved in committing railways to companies which His Excellency the Viceroy has noticed, one—the extravagance of the system—is exclusively owing to the peculiar operation of the guarantee. The others, no doubt, have a real existence, but they are in course of abatement. The sedulous efforts of the Viceroy himself have already done something, and will doubtless do more, to diminish the most intolerable evil of all, the ill-treatment of the Native passengers. Moreover, both this and other habitual breaches of the duty which the companies owe to the public will be committed with less impunity if the legislation contemplated at the coming sitting of the Council be carried through,[1] and since the recent multiplication of the tribunals to which British railway servants are amenable.

8. If it be settled that the agency of joint-stock companies is to be employed in constructing the new railways, it has yet to be decided whether the Government aid, which must undoubtedly be given to them, shall be given in the form of guaranteed interest or in any other shape. The Secretary, Colonel Dickens, deprecates our entering into this question until the great mass of minutes and memoranda which has been written upon it has been critically examined. But the contents of these papers will, I believe, be found to be nothing than (1) illustrations of the characteristic inconvenience of the guarantee, the extravagance into which it tempts the companies; (2) a variety of schemes, of which our late Secretary, Colonel Strachey, was the chief author, for subsidising, or otherwise assisting, the companies under such conditions as might be expected to remove the temptation to extravagant expenditure. As to the first point, the fact of extravagance, there can be no question. The security and the rate of dividend

[1] See the repealed Acts IV. of 1879 (secs. 5-9) and IV. of 1883, and the present Indian Railway Act, IX. of 1890, chaps. iv., vi., vii., and ix.

guaranteed being both better than could ordinarily be obtained in the market, it has been the interest of the existing railway companies to sink as much capital as possible in their lines. It must be recollected, however, that while these lines were in process of construction none but the most sanguine of business men were clearly persuaded that, when opened, they could possibly earn more than the guaranteed interest. But the example of the Great Indian Peninsular, of the East Indian, and of the Eastern Bengal Railways, has now proved that this impression was unfounded, and the prospect of ultimately earning a dividend higher than, and independent of, the Government guarantee, will henceforward prove an effective check on wastefulness as respects all lines carefully selected with a view to their commercial prospects. No doubt, in the construction of such lines as that from Lahore to Pesháwar—lines in regard to which commercial profit is a secondary consideration—there will still be risk of extravagance; and the utmost vigilance of Government, rendered more effectual through past experience, will be needed to restrain it. Indeed, the line to Pesháwar appears to be one of the few which Government might, perhaps, keep in its own hands, since the military and political objects for which it will chiefly be constructed are of a class not likely to lose their importance in the eyes of statesmen. However this may be, it is certain that if joint-stock companies are called on at all, it must be on the principle of guaranteed interest. It will be found, I imagine, on Colonel Strachey's return to India that nobody is more satisfied than he of the impracticability of all the plans, many of them displaying remarkable sagacity and ingenuity, which have been proposed as substitutes for the guarantee system. No proposal which does not, to a certain extent, eliminate the speculative element in Indian undertakings is in the very least likely to find favour with the English money market; and whether the Government borrows directly, or through joint-stock companies, it will never attract English capital to India in large quantities unless it offers the capitalist a certain minimum profit on his investment.

9. As regards the rate of speed at which the new railways should be constructed, the Bombay Government proposes to

commence the Indus Junction line, and the line from Delhi to Guzerat, at once, and in each case at both ends simultaneously; and it further lays down principles which would apparently justify the prompt commencement of all projected railways, at all events in Central and North-Western India. There is so much in Sir Bartle Frere's Minute with which I entirely concur that it is with some regret I feel myself compelled to join the Commander-in-Chief in lamenting that the picture of the capabilities of India, which we have received from Bombay, should, on the whole, be so greatly overcharged with colour. It is quite true that the ingenious expedient to which Sir Bartle Frere has had recourse, of superposing on a part of the map of India outlines of the principal European countries, may convey to an English eye a juster idea than has, perhaps, been presented hitherto of the scale on which the Government of India works; but it is equally true that any contrivance which leads our countrymen at home to measure the wealth and productiveness of India, either by mere space, or even by space combined with density of population, is in a high degree delusive. There are symbols which speak to the mind through the eye almost as vividly as coloured diagrams, and certainly more truly. Such symbols are figures. Now, if the area sketched by Sir Bartle Frere be somewhat reduced, so as to include only the countries which will be served by the railway from Delhi to Guzerat, and so as to exclude the tracts to which the Indus line on the one side, and the line from Allahabad to Bombay on the other, will be of principal importance, the space which will remain, and which will be nearly conterminous with the Native States of those parts, will still be large enough to contain the largest of the European countries figured on the map. But the aggregate revenue of the European countries thus sketched cannot be much less than 300 millions sterling, and the revenue of the very smallest and poorest of them is not less than ten millions. What is the revenue of the Indian territory contained in the outline which makes the largest and richest of these European States look so insignificant? Probably nobody can tell its exact amount; but I am informed, on very high authority, that it does not exceed three millions sterling.

Nor is this all. Revenue in this case includes much which, in Europe, is rent, and it is further in these particular countries levied with a severity of which the least scrupulous European Government would be ashamed. I do not for a moment doubt that the Delhi and Guzerat Railway has a fair prospect of becoming profitable through the growing wealth and commerce of those parts of British India which it will join to the sea; but its prospects certainly cannot be measured by a mode of illustration which takes no account of the characteristics of India as a whole, which Sir William Mansfield has called to our recollection, and still less of those characteristics of these particular provinces which must always impede their advance in wealth, their comparative maladministration by the Governments to which they are subject.

10. It would be a not inconsiderable evil if, by unduly glowing descriptions of the capabilities of India, British capital were attracted hither in greater quantities than would admit of its returning a reasonably large and tolerably prompt return to the capitalist. Theoretically, no doubt, there is scarcely any limit to the amount of capital which may be bestowed in India with advantage to the country; but the results to the British dominion in India, and thus ultimately to the country, may be by no means of unmixed good. If private adventurers bring their capital to India, and are disappointed by the return, the immediate consequence is that the fault is laid at the doors of Government. Such complaints fructify in wide schemes for revolutionising our system, which find an echo in England; and hence this Government—which (type of conservatism though it appears to some persons) is really one of the most unstable in the world, through the rapid changes in its *personnel*, and through the alternate rise and fall of the conflicting doctrines of its great administrative schools—is still further disturbed by cruder theories of home manufacture. Should, however, this particular risk be averted by the Government guaranteeing the capitalist a minimum return on his investment, the premium paid, if in excess, can only be supplied by over-taxation, the one injury which, next to outrage on their religious feelings, the people of India are likely actively to resent.

11. I entirely agree with the Commander-in-Chief that the true limits to the extension of our railway system are, first, the amount of capital the English money market is ready to supply at a reasonable rate, which is a question for the Secretary of State; and next, the amount which can be spared from our revenues, without over-taxation, for the payment of guaranteed interest, which is more especially a question for the Government of India. And I heartily join in His Excellency's wish that this last amount should no longer be left to fluctuate, but should be fixed at a permanent figure until our railway system is completed.

12. Assuming that our available margin of revenue does not permit the simultaneous commencement of all the three lines before us, or even of two of them, the further question of the order in which they should be undertaken is one on which it would be presumptuous in me, with my comparatively limited knowledge of India, to offer a confident opinion. But if I were absolutely compelled to pronounce on the point, I am bound to say that I should concur with His Excellency the Viceroy rather than with the Commander-in-Chief. As I understand it, the Lahore and Pesháwar Railway is almost exclusively recommended by military and political reasons. On the other hand, the importance of the Delhi and Guzerat line is chiefly, if not wholly, commercial. At all events, until the Minute is received in which Sir R. Napier promises to maintain the contrary opinion, I think I may venture to make this assumption, supported as it is by the facts that the princes whose territory the railway would pierce are peaceable and well-disposed, and that there will shortly be railway communication between Bombay and North-Western India, through the western limb of the Great Indian Peninsula line. But the Multán and Kotrí line would appear to have, at the same moment, both great military and great commercial importance. It is only second to the Lahore and Pesháwar line in the addition it will make to the security of the North-Western Frontier, and it will connect with the sea, by an easy line of access, a series of provinces of which some are growing in wealth more rapidly than any other part of India; while nearly all of them, through their exclusive subjection to the

British Government, possess a guarantee of progress which is wanting in most of the territory traversed by the railway which is to join Delhi with Guzerat. While, therefore, I state my view with diffidence, I would place the three railways in the following order :—

(1) Multán and Kotrí.
(2) Delhi and Guzerat.
(3) Lahore and Pesháwar.

JUDGE ADVOCATE GENERAL

SEPTEMBER 10, 1867.

I HAVE long been of opinion that it is urgently necessary to place a professional lawyer at the head of the Judge Advocate General's Department at head-quarters in India. Several further changes will, in my humble judgment, be required before the system of military justice in this country is brought into a satisfactory condition ; but the measure on which our views are requested by the Secretary of State is a first step in what I believe to be the right direction, and it appears to me to be imperative.

2. The burden of proving that it is expedient to have a military man at the head of this department in India rests, I submit, on those who assert the expediency. The Judge Advocate General at head-quarters in England is a professional lawyer. So also, if I am not mistaken, is the Judge Advocate of the Fleet. If it be said that the army in India is rather in a position analogous to that of an army on a campaign, I reply, with His Excellency the Commander-in-Chief, that in the last two European wars of any magnitude in which British troops took part—the Peninsular War and the Crimean War—the Judge Advocates General attached to the commanders of the forces were members of the Bar.

3. It cannot be said that the reasons for administering military justice with regularity and precision are weaker in India than in England. On the contrary, they are obviously much stronger. A court-martial in India is the ordinary criminal court for the trial of civil offences committed by persons amenable to the Articles of War at a distance of

120 miles from a presidency town. All the considerations which have led to the trial of persons committing such offences in England by the ordinary criminal courts make in favour of assimilating the military judicial system of India, as far as may be practicable, to that of regular civil tribunals.

Nor can it be argued that, in consequence of the obscurity of military trials in India, a rougher system suffices for this country. On the contrary, there is much more need here than at home for that attention to definite rule which is apparently necessary to satisfy the popular sense of justice. Owing to the paucity of topics of interest in India, the public attention is fastened on military trials to a degree unknown at home, and the popular verdict is echoed in England, often too late for review or reversal.

5. Abstractedly it seems to me almost as difficult to show that a military man should be at the head of the Judge Advocate General's Department as to prove that a lawyer would make a suitable Adjutant General. My impression is that the subjection of the department to strict professional control has only been postponed from the difficulty which once prevailed in India of obtaining a competent lawyer for the office for anything like a reasonable remuneration.

6. At the same time, I am anxious to state that I share to a considerable extent the opinions expressed by His Excellency the Commander-in-Chief in his letter of February 5, 1867, to the Judge Advocate General in England. I wish to separate myself from the popular assailants of the office, who base their charges against it on allegations of servility and incompetence.

7. As to the imputation of want of independence, I will merely add to Sir W. Mansfield's vindication the remark that the charge is one which it is necessarily very easy to bring against a military man, and which it is necessarily difficult for him to repel. So long as subordination is among the chief of military virtues, so long indeed as it competes with courage for the first place among those virtues, the assailant of the legal adviser of a commander-in-chief can always insinuate a charge by substituting a bad name for a good one, by changing, as Bentham would have said, a eulogistic into a dyslogistic

term. It is somewhat hard on the Judge Advocate General that he should be placed in the apparent dilemma (and I admit it is for the most part only apparent) of defending himself against the reproach of disqualification at the cost of disclaiming a high military quality.

8. I have offered this observation chiefly for the sake of pointing out that the charge of want of independence is much less likely to be advanced against a professional lawyer in the position of Judge Advocate General. Most assuredly the pursuits of a lawyer are no complete protection against the misleading influences of friendship, partisanship, or corrupt expectation. But unquestionably his professional instincts do to some extent protect him, and are popularly believed to protect him, against those influences. The servility which a lawyer contracts in the practice of his profession is servility to certain definite rules, principles, distinctions, and doctrines. The discredit which disregard of these canons, even through ignorance, hangs upon him, is as deeply felt as any professional penalty can be; and it is in truth the fear of this discredit which counteracts the evils attendant on professional advocacy when concerned with facts. If there be any member of the profession to which I have the honour to belong who, for the sake of serving a friend or patron, would deliberately risk the imputation of having, in a professional opinion or judicial decision, propounded bad law, I can only say that I have not had the fortune or misfortune to meet him.

9. On the accusation of incompetence, feeling as I do the futility of encountering a general charge by a general defence, I think it best to adduce my own experience. I have not seen very much of the work of the Judge Advocate General's Department, but I have from time to time seen more or less of it, and what I have seen in no way bears out the assertion of incapacity. It is in a high degree careful and minute; in truth, its faults are over-minuteness, and, if I may so put it, a certain disregard of the proportionate importance of the facts reported upon; the very faults, indeed, which might be expected in gentlemen engaged in a professional occupation, but deprived of the tests and correctives supplied by actual professional life and practice. These defects, which prove

nothing against the intelligence or knowledge of the department, but which certainly have a tendency to expose it to the imputation of occasional want of common sense, are not ordinarily found in a professional English lawyer, if properly selected. Such a professional adviser would also be able to contribute a kind of assistance little likely to be obtained from the department as at present constituted. He would be able to judge, not only what is the aspect of alleged facts on paper, but what aspect they are likely to assume as orally described by witnesses, or as distorted and glossed over by advocacy; and what effect they are likely to have on a tribunal which, though undoubtedly more cultivated and more diligent in duty than average juries, has nevertheless many of those peculiarities of a popular tribunal, of which every legal adviser is practically obliged to take account.

10. The main ground on which I urge the advisableness of appointing a professional Judge Advocate General is identical with that taken up by Sir W. Mansfield. Whether the work of the Judge Advocate General's Department be good or bad, the popular want of confidence in it produces fruits which seem to me in the highest degree injurious. What I assert is, that the Commander-in-Chief in India is practically made responsible for the due discharge of duties which the theory of military justice does not impose on him. That theory I believe to be that, on all technical questions, the opinion of the Judge Advocate General is conclusive, and that the province of the Commander-in-Chief is to take opinion or decision just as it is given out of the hands of his legal adviser, and then to consider what practical application it shall receive, regard being had to the interests and morality of the army under his command. But I am quite unable to discover that the boundaries between these functions are in the faintest degree recognised by popular opinion, which seems to me systematically to confound the question whether a right discretion has been exercised with the question, whether a right judgment has been formed upon evidence or law. There appear to me to be but two ways of explaining this. Either the opinion on technical points is supposed to have been dictated by the Commander-in-Chief from the first, so that he

is practically responsible for it, or else the opinion is believed to be without value in itself, so that the Commander-in-Chief, however little his previous habits of life may have qualified him for such inquiries, is thought just as capable of investigating the merits of the question solved as the author of the solution. In other words, we are brought round to the alternative charge of servility or incompetence.

11. It seems to me the merest justice to the officer commanding the forces in India that he should be relieved from responsibilities which neither the theory nor the necessary incidents of his position require him to satisfy. On all technical questions—questions of the soundness of particular legal propositions—of the sufficiency or insufficiency of certain testimony to sustain a particular conclusion—of the propriety or impropriety of admitting or rejecting certain evidence,—the opinion of the Judge Advocate General should be regarded as, if not necessarily impregnable, at all events sufficiently solid to completely justify the Commander-in-Chief in making it the basis of ulterior action. It is idle to say that the opinion of a lawyer of good repute would not be accepted as such a justification. Every day in England, both in public and private life, men are held blameless for particular lines of action because they have had recourse to the best legal advice at their command. The Commander-in-Chief, so advised, and acting on the advice received, would, if censured or condemned, be rightly censured or condemned in the opinion of all; for his error would necessarily be committed within that sphere of discretion which is properly reserved to him.

12. I think it right to add that I do not anticipate much difficulty in finding a competent English barrister for the office at a not extravagant salary. Few legal appointments in India would probably be pleasanter than that of Judge Advocate General at head-quarters. The duties, though no doubt they would afford ample occupation, would hardly be difficult or troublesome to a barrister accustomed to English practice. Apart from the law of evidence,[1] the law which the Judge Advocate General has to apply is mostly contained

[1] As regards European courts-martial held in India, the law of evidence is uncodified, Parliament having by 44 & 45 Vic. c. 58, ss. 127, 128, declared the Indian Evidence Act, I. of 1872, inapplicable to such courts.

in statutes and lies within comparatively narrow limits. As to evidence, knowledge of it and skill in appreciating and manipulating it are probably more widely diffused among the English Bar than any other legal accomplishment. I have no doubt that there would be many well-qualified candidates for the appointment. It seems to me, however, essential that part of the remuneration should consist in a retiring pension, to be earned after service of a certain number of years.

13. The opinion of His Royal Highness the Duke of Cambridge that the Civil Judge Advocate General should be assisted by a Military Judge Advocate, has in its favour, besides other arguments, the consideration that the department would embrace a functionary who could officiate for the Judge Advocate General during unavoidable absence on furlough or through sickness. The difficulty of obtaining barristers to officiate in temporary appointments is daily becoming more formidable in India.

DECENTRALISATION OF FINANCE

SEPTEMBER 13, 1867.

I MUST apologise to the Viceroy and my honourable colleagues for taking precedence of them in recording my opinion on the financial changes proposed by Colonel Strachey under the authority of the Financial Member. My excuse must be that I leave India in a few days, and shall lose, for a time at all events, the power of giving my adhesion to a proposal in which I take great interest, and which I believe to be of signal importance. The few words I have to write will be confined to the principle and general character of the plan; all discussion of detail had better, in my judgment, be postponed till the opinions of the Local Governments have been received.

I do not think that anybody can have observed the recent working of our system of financial control without coming to the conclusion that, if it be not on the point of an inevitable collapse, it is, at all events, in great danger of going to pieces, unless the strain be lightened somewhere. The rules imposed

on the Local Governments depend for their force, like all laws, on the efficacy of the penalty which they threaten in the event of disobedience. The penalty is, in the present case, a reproof from the Government of India. But if any Local Government has become—what any Local Government might become at any day—entirely callous to the rebukes of the Government of India, through discovering—what any Local Government may at any time discover—that these rebukes lead to no ulterior consequences, what impediment remains to the employment of one or more among the hundred expedients by which the Central Government may be morally compelled to condone infractions of its rules, and to allow the share of its revenues which it has allotted to a particular province to be exceeded? It is hardly matter of wonder that Local Governments should learn this lesson. India is now very near England; Indian affairs are much discussed in public; the opinions of authorities to which this Government is subordinate are frankly declared and widely disseminated; and thus the head of a Local Government must be very dull indeed who does not gather that our rules of financial control are losing credit in the very quarters in which, if they are to be rigidly enforced, the belief in their usefulness ought to be strongest.

It seems to me very poor statesmanship to neglect such considerations. Our system may be good or bad; but, even if I believed it to be more perfect than I do, I should say that it was time to alter it if the means of applying it in its integrity were failing us.

But my belief is that it goes to undue lengths in what it attempts, and miscarries miserably to the extent of the excess.

The proposal before us, which appears to me to be as remarkable for its moderation as for any other characteristic, is to transfer to the Local Governments certain items of charge and income which, if the accounts of the present year be taken arbitrarily as a basis, almost exactly balance one another. The items of charge transferred are those over which, from the nature of the case, the Government of India can exercise no control, or next to none. The items of

revenue are those which no action of the Government of India can render more fruitful. If we now wish to augment the last or diminish the first, we must work exclusively through the Local Governments.

I must maintain my opinion that the principle sought to be applied has been long since recognised, and that the practical effect of what is proposed to be done will be simply to increase those local funds on which the Local Governments set the greatest store, which they have the strongest inducement to economise, and which nobody suggests should be taken from them. I can discern no test whatever of a local fund, other than a municipal fund, except that it is wholly raised in a particular province, and wholly expended in that province under the authority of the Government of the province. Its legislative origin counts for nothing, because, in fact, there are many sources of Imperial revenue which were at first of local origin, and not a few local imposts are, as may be seen by glancing at even recent enactments, levied under Imperial authority. Now, the funds and parts of funds which Colonel Strachey proposes to transfer are wholly raised within the province; when the transfer has been effected, they will be wholly expended in the province under the allocation of its Government. No criterion of a local fund will, as it appears to me, be wanting.

A good illustration is furnished by those cesses for local purposes, such as education, which are levied on land in certain provinces of India. They constitute a clear addition to the land-revenue, and to the tax-paying agriculturist it is indifferent whether they are reckoned separately or lumped in his aggregate payment. It appears to me that the part of the land-revenue which the plan before us proposes to separate from the rest and to allot to the Local Government for local purposes is exactly in the same position as these cesses. In truth, the fraction deducted is partially to be spent on precisely the same objects,—for instance, roads. Call it indeed a cess, and the question, which is purely verbal, is ended.

If it be established that these proposals do in effect only augment local funds,—funds, that is to say, raised in the province for objects confined to the province,—it seems to me

that we may safely in the end augment them up to the amount of the English county expenditure, compared with which the revenue proposed to be immediately transferred is quite trivial. All the reasons which make in favour of our retaining so large a proportion of the revenues of India in our hands seem to me to be arguments for placing the English county expenditure under the direct control of the House of Commons. Indeed, the latter class of arguments are rather the stronger, since it may be said that the payers of county rates are much more truly represented in Parliament than among the authorities which levy and disburse those rates. If, however, an attempt were made to give effect to such arguments, the reply would be that the Treasury and the House of Commons have quite enough to do already, and that local watchfulness, even by a defectively organised body, is always more effectual than central control exercised under the disadvantages which are inherent in such control. I am unable to see why the force of this reply is wholly spent in India.

The argument derived from the alleged extravagance of the Local Government seems to me to be pushed a good deal too far; but admitting within limits the fact of such tendency to extravagance, I regard it as the natural fruit of the present system. I suppose that it will be conceded that both men and Governments discharge a clear duty better and more completely than a remote, obscure, or contingent duty. Now, the clear and primary duty of a Governor or Lieutenant Governor is to promote the moral and material prosperity of the population under his government. On the other hand, the duty which the Government of India has imposed on itself, and which no doubt it conscientiously tries to discharge, is to regulate the expenditure on the objects sought to be promoted by the Local Governments on principles determined by the financial necessities and the financial condition of the Empire as a whole. No doubt it is the duty of the Local Government to observe the limitations imposed on its legitimate ambition by the Government of India; but this is a duty of a very different and much more indistinct kind than that of doing palpable good to a subject population. For my

part, I do not greatly wonder that a Local Government should try to get all that is to be got, and should not be very scrupulous in its contrivances for getting it.

I imagine myself to have only put into other words what Colonel Strachey means when he says that Local Governments have as yet to acquire the sense of financial responsibility. How that sense is to be created, except by some such plan as is before us, I cannot see, and have never heard explained.

It seems to me too hastily assumed that the nearly exclusive control now enjoyed over the finances by the Government of India results necessarily and inevitably in economy. For the Government of India, as at present constituted, it may, I think, be fairly claimed that, while it is free from the bias of local interests, it has no special tendency to extravagance peculiar to itself. But the truth is perpetually before us that the Indian Government, in all its parts, is one of the most ephemeral in the world. Five, ten, or fifteen years hence we may have a Governor General with special crotchets—let us say military crotchets—which, falling in, it may be, with popular fancies, may lead him into expenditure transcending the most wanton extravagance of all the Local Governments together, and for which, moreover, there would be nothing to show when it was over.

I see positive advantage in curtailing to some extent the proportion of the revenues of India at the absolute disposal of the Central Government, and in finally appropriating a considerable part of those revenues to the needs of Local Governments. I can quite conceive a campaign on the Oxus or the Jaxartes being undertaken with less precipitation if the Supreme Government had lost the power of summarily stopping all public works throughout India, and could only pay for military glory by borrowing or taxation. If the Indian public debt be analysed, I venture to say that, putting aside the results of the events of 1857, it will be found to have been mainly incurred through Imperial, and not through local, extravagance.

Mr. Maine was seldom called upon to consider questions of finance. The following extract from a minute on a proposed reduction of the

salt duties, shows how he dealt with such of these questions as came before him.

Turning again to Mr. Strachey's proposals, I do not understand that either he or Sir W. Mansfield, who agrees with him, expects in point of fact that any present perceptible relief will be given to the consumer. It is the 'inauguration' of a new salt policy which they desire. They wish, if I am not mistaken, to commit the Government by a decided step to a reduction of the salt duties and to an extension of direct taxation. I perfectly understand all that is generous in this programme, and I do not for a moment quarrel with it because it may be called 'sentimental.' But, with genuine deference to gentlemen whose studies have lain in this direction so much more than my own, I doubt whether the plan which commends itself to them can be justified on financial principles. I can hardly be wrong in saying that, if taxation be reduced with a view to give relief to a particular class, the relief should be a real relief flowing under the operation of economical laws from the measure of reduction. Still more strongly do I think that no class should be asked to submit to additional taxation unless a clear material advantage is conferred either on itself or on some other class which has an equitable claim to be relieved at its expense. It is surely without precedent that a Minister of Finance should propose to increase or reduce taxation without tangible prospect of a particular result, solely by way of a moral guarantee that he or his successor will hereafter add to or diminish the public burdens at a time when that result is attainable.

The question is one upon which I give my opinion with hesitation, but, upon the information before us, I think that further inquiry should be made as to the incidence of the salt duties in Lower Bengal, and that, all possible speed being made with the works required for an augmentation of supply in Upper India, the reduction of duty should be postponed till those works approach completion, when—and when only, as it seems to me—the reduced duties can have fair play.

Mr. Strachey has referred to the conclusion drawn by me from the fact stated on high authority that salt was not usually paid for, but given by the dealer ostensibly for nothing

along with the grain purchased. Mr. Strachey argues that this proves nothing more than the inability of the people to buy more than the smallest quantities of salt. He may be right, but the fact was certainly adduced in Council, as explaining why it is that the pressure of the salt duties is not consciously felt or complained of by the people.

DRAFT OF DESPATCH RESULTING IN STAT. 33 *VIC. C.* 3

JANUARY 10, 1868.

TO HER MAJESTY'S SECRETARY OF STATE FOR INDIA.—My Lord Duke,—With reference to the fifth paragraph of your predecessor's despatch, No. 182, dated November 30 last, in which Sir Stafford Northcote observes that he does not trace the effects of over-refined legislation in the Agror outbreak, but rather the results of certain incautious executive measures, we have the honour to state that we entirely concur in this view. We had no intention of implying in our despatch of September 2, 1868, that 'unsuitable laws and regulations' had any share in producing the disaffection of Attá Muhammad Khán or the inroad of the border tribes. We will proceed to explain more fully the course of our reasoning, which, in our former despatch, was briefly indicated by a reference to the abusive exercise by Attá Muhammad Khán of certain powers confided to him by the Government of the Panjáb.

We have to point out to Your Grace that on the annexation of a new territory to British India many difficulties arise as to the status of its population which are of a legal character, but which, however unfortunate it may seem, must nevertheless be dealt with under our present system of government and administration. The new territory becomes part of Her Majesty's Indian dominions, its inhabitants become Her Majesty's subjects, the Council of the Governor General for making Laws and Regulations becomes the sole authority which can legislate for it, and, unless it be specially excepted, all general enactments apply to it.

Practically, however, it is found necessary to leave such territories for awhile under a system bearing more or less

analogy to that which prevailed in them before the conquest. As in the case of Attá Muhammad Khán, certain of the chiefs are left in the enjoyment of quasi-patriarchal power, or the Executive Government affects to confer such power upon them and to limit it when once conferred. It must be obvious, we think, that the authority to sanction or confer these subordinate jurisdictions (which, however, are well adapted to the people) is from a strictly legal point of view extremely doubtful. The natives of the territory retain, no doubt, their own customs and laws until they are altered by legislation; but it seems to us impossible to hold that persons who exercised power or jurisdiction over others under the former Government retain the same power and jurisdiction when they become the Queen's subjects; and, even if that were so, it would not be open to a Local Executive Government, like that of the Panjáb, to confer any new authority of the kind or to limit such authority if it existed, except so far as its orders previous to 1861 have been continued by the Indian Councils Act.

This class of difficulties has been surmounted or evaded in much of India by the management of these new and wild countries in the Political Department, a system which appears to rest on the assumption that they have not altogether, or for all purposes, been incorporated with the Queen's dominions. We apprehend, however, that the Hazára district and the Trans-Indus territory have ever since the conquest been considered an integral part of the Panjáb, and that certain of our legislative enactments are in force there—a fact wholly inconsistent with their being in any sense foreign territory. Considering, then, the difficulty which (as appears from our despatch addressed to Your Grace's predecessor on the Keaeghat case) attends our replacing or placing for the first time under the Political Department territory which has once been incorporated with Her Majesty's dominions, we think it very desirable that a system of administration by which a certain degree of independence should, under proper control, be left to chiefs and men of influence in these countries should receive the sanction of legislative authority. The mere abstinence from legislation would, as Your Grace will easily

perceive, not only not meet the case, but would aggravate the embarrassments to which we have adverted. But it is for this description of legislation that we do not consider our present legislative machinery well adapted. The first steps towards such a system must be tentative and capable of being easily retraced and varied. A simpler mode of exercising legislative power than that provided by the Indian Councils Act would seem desirable for the purpose of legalising such experiments; and, in fact, the legislative machinery which we prefer for these wild territories, and which we recommended to Sir Stafford Northcote, would differ only from the executive machinery now applied by the Panjáb Government in its securing a greater degree of caution and deliberation for all measures that might be adopted towards the chiefs and people.

33 Vic. c. 3, s. 1, accordingly empowers the Local Government to propose to the Governor General in Council drafts of regulations for any place to which the Secretary of State for India in Council has declared that section applicable. Sec. 2 directs the Governor General in Council to take the draft into consideration. [This means, in practice, that it is drawn or recast in the Legislative Department.] When the draft has been approved by the Governor General in Council and received the Governor General's assent, it is published in the gazettes, and thereupon has the force of law. Under this useful statute a large number of regulations have been made for the wilder parts of Bengal, Bombay, the North-West Provinces, the Panjáb, and Burma, and for Coorg, Ajmer and Merwára, Assam, the Andaman and Nicobar Islands, and British Baluchistán.

THE BENGAL LEGISLATURE

FEBRUARY 27, 1868.

MY opinion on many of the questions put to us by the Secretary of State will necessarily possess much less value than the opinions of those of my colleagues who have had a larger experience of India. I have, however, been nearly six years in charge of the Legislative Department of the Government of India, and I may, therefore, venture to claim some degree of attention for the conclusions I have come to on the points raised by Sir Stafford Northcote in his 16th and 19th

paragraphs, which relate to suggested changes in the machinery of legislation.

I am strongly in favour of restoring to the Executive Government that power of legislating for the less advanced portions of the country which it once possessed in fact. It might, perhaps, be enough to point out that, if there had not been a general belief in the existence of that power, there would almost certainly have never been a formal legislature in India. Lord Dalhousie, when he pressed for the establishment of the first Legislative Council, unquestionably believed that his Government possessed the same legislative authority over non-regulation territory which the Crown exercises over Crown Colonies up to the moment of according to them distinct legislative institutions. The legal correctness of the doctrine on which this claim to legislate 'executively' rested was, indeed, strongly denied by my predecessor in office, Sir Barnes Peacock; but, in practice, the Government continued till 1861 to act as if it possessed the power in respect of all the outlying and newly-annexed provinces. At length, however, the Indian Councils Act of 1861, according to the better construction of its language, took away from the Executive Government all legislative authority over non-regulation territory, at the same time that it gave the force of law to all the rules which had been made in the belief that the authority existed. The intention of the statute of 1861 seems to be that local Councils shall gradually be established in all the provinces of India. As a matter of fact, however, it has not yet been found possible to establish a local legislature even in a part of the country so long settled and so well understood as the North-Western Provinces;[1] and the result is that no new law or rule which is required for any province other than Madras, Bombay, and Bengal Proper, can be sanctioned by any authority in India other than the Supreme Legislative Council, sitting usually for three or four months in the year, and almost exclusively at Calcutta.

The absolute denial of legislative power to the Executive Government, as it affects the wilder and less civilised portions of India, is most inconvenient, and, I venture to think, most

[1] This measure has since been taken.

dangerous; for it comes to this, that the Executive Government can do no act unless there is a known rule to back it. This might be all very well if India was—what China was once supposed to be—a country in which there was a rule for every possible contingency. But the government of the country is an experiment conducted under perpetually changing conditions. Those who know most of the people in the outlying provinces probably know but little of them; mistakes are constantly discovered which ought at once to be corrected; peculiarities of character and feeling unknown before have suddenly to be allowed for; and new circumstances arise to which measures must be moulded. As matters stand at present, the Government can do nothing without coming to Calcutta for a formal law, the reasons for which it is often not easy, and occasionally not safe, to assign. Moreover, the law in question has to be asked from a Council which is not really responsible for the peace and good government of the territories to be legislated for. No doubt in practice the Legislature shows great good sense by accepting these laws from the local functionaries without questioning them. Still, it is just possible that a law imperatively required for the safety of the Trans-Indus Frontier or the peace of the wild country in the Central Provinces might be refused; and, if so, what responsibility could be fixed on the members of the Civil Service from Madras, Bombay, or Bengal Proper, or on the gentlemen belonging to the Calcutta mercantile community who sit in the Council? Yet, public opinion in England exacts from the Executive Government of India the responsibilities of a despotism—even over the more settled provinces to a much greater extent than is commonly believed here—over the wilder provinces absolutely.

Nor must it be left out of account that the public debates in the Council, which, in my judgment, have an excellent effect (so far as they go) on the civilised and settled provinces, might do us great injury in the rest of India, to which they are sure to penetrate, if they do penetrate, in a distorted and falsified shape.

To the other question asked by the Secretary of State—Shall the local Bengal Legislature be abolished, and its

functions transferred to the Supreme Council?—I am compelled to give a very decided answer in the negative. I greatly regret that on this point I am at issue with His Excellency the Viceroy.

His Excellency has remarked that the Bengal Legislative Council does not possess the same weight as the other local legislatures. I certainly have observed that there has been in some quarters much disparagement of the Bengal Council; but I strongly suspect that, if we knew more of the Madras and Bombay Legislatures, we should find them not less roughly treated by the local press. There is one additional reason for not giving any extraordinary weight to these adverse criticisms. Their authors are obviously, and no doubt honestly, desirous of chaining the Government of India to Calcutta, and no more promising expedient could be devised for this object than compelling the Supreme Council to undertake the whole local legislation of Bengal Proper. I quite understand, at the same time, that the Viceroy has very different objects in view when he proposes the suppression of the Local Council, and it is curious to reflect how very little pleasure it would give to the assailants of the Bengal Council to be taken at their word in the sense in which His Excellency would take them.

Looking simply at the proposal to suppress the Local Council and transfer its duties to the Supreme Council, I am opposed to it on a variety of grounds. Speaking from my own observation, I think the Bengal Legislature does all its work reasonably well, and a good deal exceedingly well. And, whether it does it ill or well, I am quite sure that the Supreme Legislature would do it a great deal worse. It is, indeed, possible that the Local Council sometimes addresses itself to subjects which could be better disposed of by the Governor General's Council. But, if that be so, the fault is attributable to the Supreme Government and the Supreme Legislature, since the Supreme Council can take any subject it pleases out of the hands of the Bengal Council and can supersede or repeal its legislation.

The effect of the transfer of the Bengal business to the Supreme Council would be, as far as I can see, to break it

down altogether. In my humble judgment, we have already too much in the Supreme Legislature of what I hope I may call without disrespect the 'parish vestry' business of the North-West, the Panjáb, and the Chief Commissionerships. There is before us at the present moment the most important law which it has ever been proposed to apply to India, not even excepting the Penal Code. The Indian Contract Bill, which the Indian Law Commissioners have prepared, and which we hope to apply to all classes in India,[1] will affect the every-day transactions of one of the most industrious populations in the world, and most thoroughly imbued with the commercial spirit. It would not be too much to say that, if the select committee on this Bill met during every working hour of the week, it would not be time wasted; yet I have not been able to allot to this committee more than one afternoon a week, merely because we are busy in discussing such questions as what is the best way in which Municipal Committees in the North-West can abate petty nuisances, and under what restrictions they shall be allowed to borrow money for the digging of tanks. The legislation of the Bengal Council would be a crushing addition to our work. It must always be very heavy, for Bengal Proper is a law-abiding province; and it must also be very minute, since it will have to govern the concerns of a population with a very decided turn for law, and since it will be exposed to examination by dignified courts composed of subtle and wary lawyers.

I object further to the proposal because it will entail a very unsatisfactory change in the composition of the Supreme Council. Nothing, to my mind, can be plainer than the principles on which that Council should now be constituted. We require gentlemen who can explain the practical difficulties which attend the application of laws to parts of India in regard to which European experience or received European principles play us false. We require to know what view of a tax will be taken by a half reclaimed Pathan marauder on the other side of the Indus; what will be the effect on Marwárí traders in Guzerat of a change in the law of negotiable instruments; what difficulties will arise from altering the

[1] This has been done by Act IX. of 1872.

received rule of 'market overt' among the cattle-stealing populations on the border of the Native States. We need the aid of authorities on the intricate land-revenue law of the temporarily-settled provinces, on the heterogeneous land-tenures of the Panjáb and North-West, and on the multitudinous family and clan customs characteristic of all North-Western India. But if we undertake to legislate for all Bengal Proper, we must, in justice to that wealthy and civilised province, half fill the Council with Bengal civilians and educated Bengal Natives—classes both so leavened with European ideas that they will be of little or no use in helping us to ascertain the modifications of first principles which are the conditions of their application to India as a whole. Speaking from my own experience, I should say there would be no more dangerous ingredient in the Council than a large number of educated Bengálí Natives. Nobody charged with the conduct of the Legislative Department will ever fail to be inundated with their proposals for legislative innovation; and, if those proposals are serious, all I can say is that there are many of them which Bentham himself would have thought premature.

Conversely, I think, Bengal will suffer from not having liberty to discuss and enact a certain class of measures in an assembly composed of Native and European gentlemen exclusively familiar with the province and the people. The province stands by itself, in respect of the character of the Native population, the large admixture of Europeans, the peculiar nature of the revenue settlement, and the absence of institutions which are the basis of society in other parts of India. Many things are practicable in Bengal Proper, and many things are desirable which are not practicable or desirable elsewhere. I do not see why the moral and material progress of Bengal should be impeded by the doubts of gentlemen intimately acquainted only with the less intellectual and less supple populations of Upper India.

So far from compelling the Supreme Council to undertake more local legislation, I would gladly see its functions narrowed in the main to the consideration of financial measures and of the portions of the Code successively sent out to

us by the Indian Law Commissioners. I am sure that all the time economised through the diminution of local legislation would be well expended on the measures I have mentioned. Wherever the power of summary legislation cannot be reasonably exercised, I would establish a small Local Council, only avoiding the mistake into which the present local legislatures seem to me to have fallen of having regular and periodical sessions. I entirely agree with Sir W. Muir that the North-West is entitled to a Local Council; but it should only meet when legislation is actually wanted, and should not always sit with open doors.

The Viceroy, in advocating the abolition of the Bengal Council, contemplates further changes which would, to a certain extent, obviate the objections I have taken. He would 'grant the power of summary legislation for the whole of the Bengal Presidency and its dependencies.' And he would, no doubt, say that a great deal of legislation would be got through under the summary power, so that no great additional labour would be thrown on the Supreme Council.

His Excellency will pardon my arguing that, so far as regards Bengal Proper, the change he proposes, which is certainly very serious, is also of very doubtful expediency. Nobody with the least self-respect would care to echo those assertions of the inherent rights of Englishmen which are sometimes current here. Yet, in settling the legislative mechanism fittest for this province, we cannot quite put aside the fact that the powerful class consists of Europeans, and of educated Natives, who, when their interests allow it, write, talk, and think as much like Europeans as they can. We cannot give this class representative institutions; but it is a very serious matter to withdraw from them a formal legislature when they have once had it, and to subject them to that concrete form of despotism which consists in the complete blending of executive and legislative power.

No doubt there would still remain the Supreme Council. But it would only be called into action when the Executive Government chose, and I presume that it would never have measures submitted to it on which the Government disliked debate, or to which it feared serious opposition. Now, to

take the last contingency first, the cases in which the Government could not carry a measure either in the Supreme or Local Council by putting forth its full strength must always be very rare, and, if they did occur, I should venture to think that there was a good deal to be said on the side of the opposition; and, under any circumstances, I think it would be much better undisguisedly to pack the Council than to dispense with its share in legislation. The other advantage to be gained—the avoidance of public debate—is, in my mind, the reverse of an advantage in the more civilised provinces. So far from its being desirable that we should legislate without giving reasons for our legislation and without meeting objections to it, it seems to me that the want of power to defend our measures is our great weakness. We stand alone among the Governments of the civilised world in having no means, except the most indirect, of correcting the honest mistakes or exposing the wilful misrepresentations of a completely free press. It would be unjust to say that we are always unfairly treated; but the Governmental side of most of our measures is seldom perfectly brought out, and not at all when those measures are unpopular. Yet it is quite idle to say that the public opinion which is thus arrayed against us is of no importance to us. It penetrates to England through the compendia of Indian newspapers which circulate there, or through the correspondence of the English press. Languid as is the interest of England in India, English opinion of public measures and men in this country is apt, on the whole, to follow Indian opinion, which thus becomes a real power. So far from thinking it desirable to add to the weakness of this Government by placing it under a temptation to shrink from publicity, I would myself prefer to relax in some degree the precautions taken in the Indian Councils Act to prevent the Indian Legislature from giving itself the airs of a parliament, and I should like to see effect given to the proposal of one of our colleagues that even executive measures should be occasionally discussed in public, provided that it were done by the express permission of the Governor General, and only in the Supreme Council.[1]

[1] To some extent this has been done by the Indian Councils Act, 1892, sec. 2.

When I say that I am rather in favour of multiplying the Local Councils than of diminishing their number, I must not be understood to argue against a measure of a very different kind—the drafting or revision of all local legislation in the Legislative Department of the Government of India. Some such expedient for securing technical uniformity in legislation seems to me very desirable, and I hope shortly to circulate some proposals on the subject.

I do not propose to give any opinion on the other questions asked by the Secretary of State until I have had the advantage of reading the minutes of those of my colleagues who have had an exclusively Indian training. But a fact bearing on one of these questions is conveniently mentioned here, because it has been exclusively brought home to me by my experience in the Legislative Department.

Nobody who has watched the changes which have occurred during the last five or six years in the composition of the Legislative Council can fail to have been struck by the steady deterioration, in point both of social rank and of mental calibre, of that Native element from which so much was at first expected and to which so much importance is still attached at home. When the existing Legislature was first established, it included a sovereign prince, the first statesman of the Native territories, and a wealthy gentleman of an historical family, of much influence with his countrymen,[1] and of singular sagacity. We have now two Bengálí gentlemen, of whom one was for many years of his life a Government servant, and a zamíndár from the North-West—all three very respectable, but none of any extraordinary weight. The result of my experience during these five or six years is, that we cannot get the men we want, and that, when we get them, we cannot keep them, or have the greatest difficulty in keeping them.

His Excellency the Viceroy has the nominations to the Council entirely in his hands, and it is to him that applications for his sanction to the departure of Native members are addressed. He is aware how many times and by whom the seats in Council have been declined, and whether or not the Native members exhibit anxiety to get away. I shall be

[1] The Mahárájá of Patiála, Rájá Dinkar Rao, and Rájá Deo Náráyan Singh.

surprised if he has not observed that there is the utmost reluctance to come, and the utmost hurry to depart, and if he does not attribute both to the fear and detestation with which the climate of Calcutta is regarded by all natives of India not born in Bengal, or, indeed, in the vicinity of Calcutta itself. We have seen a semi-sovereign chief reduced by these feelings to such a pass that, after two or three days' stay, he slipped away in the night, leaving a medical certificate behind him; and I state the impression repeatedly made on myself when I say that the discomfort of those Native members who do remain is sometimes quite pitiable.

I am expressing no opinion on the value of the Native element in the Council, and no final opinion on the question of the seat of Government. There are many considerations which obviously make in favour of keeping the Government of India in Calcutta during at least a part of the year, and, speaking from the point of view of my own duties, I attach great importance to the influence of the legal opinion of Calcutta on our codes, and of its mercantile opinion on our fiscal and financial legislation. But if the fact which I have noted—brought home to me as it has been by certainly a limited, but still a very marked and peculiar experience—be really a fact, it seems altogether absurd to leave it out of account in arguing the question of the future seat of government. It may be proper or quite inevitable that Englishmen should sicken or die in Calcutta, or those again may be right in whom the denial of its salubrity appears to excite a very sincere indignation. But it is surely a strong thing to assert without hesitation or reserve that Calcutta is the best or the only possible capital, if it be true that the vast majority of those who are to be governed from it refuse to come near it. There is another country—Italy—in which the 'question of the capital' is also the question of the day. The difference between the two cases is that Rome has a history, and the Italians beyond all doubt wish to go there, whereas it is really difficult to say that Calcutta was ever the theatre of any occurrence more considerable than the tragedy of the Black Hole, and the Natives of India appear to be desirous of keeping as far away from it as they can.

GOVERNMENT OF BENGAL: SIMLA: CALCUTTA

MARCH 16, 1868.

MY observations as to the constitution fittest for the local government of Bengal must necessarily be of a somewhat general character, and will, therefore, contrast disadvantageously, perhaps, with the opinions of gentlemen who speak from personal knowledge of the details of administration.

I must confess that the very strong case made by the present Lieutenant Governor for placing Bengal Proper under a Governor in Council does not seem to me answered in the minutes recorded by members of the Government of India, and I venture to think that in those minutes much too little stress is laid on the presumption against the continuance of the Lieutenant Governorship arising from the terrible calamity which occurred at the close of the last incumbency.[1] That presumption is so strong that I regard the proposal to restore the Government of Bengal to the Government of India, or to make the Lieutenant Governor a member of the Executive Council, as in itself more logical than the conclusions of those who would either do nothing or carry out some small improvements in the Bengal administrative system. I perfectly agree with the Viceroy and my honourable colleagues in thinking that a closer union between the Government of India and the Government of Bengal would probably end in breaking down both Governments, but still there is a certain congruity between the magnitude of the proposal and the greatness of the occasion.

His Excellency the Viceroy has, indeed, contended in effect that, if the late Lieutenant Governor had been other than he was, the disaster in Orissa would have been otherwise dealt with. This is probably true, but it is also true that the appointment of Sir Cecil Beadon to the Lieutenant Governorship of Bengal six years since was perfectly inevitable. As far as I know, there was no conceivable competitor for the office, and neither the present Viceroy nor any other could have made a different selection. No one under present circumstances need be afraid of praising Sir Cecil

[1] The famine in Orissa, aggravated by the action of the Calcutta Board of Revenue.

Beadon, and, therefore, I will say that I do not happen to have met anybody of higher capacity, versatility, and resolution. Who could have predicted that the serene courage which (as Sir William Mansfield, who ought to know, tells us) sustained him and others during the mutinies would degenerate into unreasonable reliance on the infallibility of a subordinate department? I am not aware that there is any known contrivance for correcting this species of vicious bias even in men of strong character and great ability, except forcing them to place themselves in contact and even in collision with other minds, possibly of inferior calibre. I will even say that, though a Lieutenant Governor had been selected who would have done more than Sir Cecil Beadon to mitigate the Orissa calamity, it is more than probable, considering the complex nature of all Bengal questions, that he would have fallen into formidable errors of another kind, and would equally have been the better for a Council.

It is further contended that, if Sir Cecil Beadon had had a Council, the Members of the Board of Revenue would have been his Council, and the same results would have followed. It seems to me just as likely that one or more of the gentlemen now on the Bench of the High Court would have been in the Council; but even granting that the very gentlemen who constituted the Board would have been Sir Cecil Beadon's councillors, it does not seem to me at all probable that their common deliberations would have ended in the same way as their correspondence at arm's length. But the facts and the probabilities appear to point in the other direction. So far as any one incident in that sad history can be marked out from the rest as the one great source of misfortune, it was the despatch of the telegram in which the Board, speaking in the name of the 'Government,' peremptorily declared that no grain should be imported. I look upon it as all but impossible that, if the Lieutenant Governor and the Board had been combined in a corporate Government, this telegram could have issued without the Lieutenant Governor's knowledge; and Sir Cecil Beadon has distinctly stated that he disapproves of the intimation which it gave, and that, if he had been consulted, he would never have allowed it to go out. To what

extent the course of events would in other respects have been changed by the closer union of the Board with the Lieutenant Governor can of course be only matter of conjecture, but that it would have been materially changed seems to me in a high degree probable. Sir Cecil Beadon displayed undoubtedly a too sanguine confidence, but he had not a particle of that tenacious faith in semi-scientific conclusions which characterised the Board. Had he stood in more intimate relations with its members, I think it likely that he would soon have found out how much of their opinion depended on facts and how much on deductions from principles assumed *a priori* to govern the particular case.

No doubt the argument which I have just used may be turned against me, since it may be said that it at most proves the expediency of abolishing the Board, and I admit that this hypothetical case is an instance in which the Governor could probably have been more in the right than his Council. Councils are, however, instituted on the assumption that Governors are occasionally wrong, and require to have their views tested by attrition against those of other men. They are in the nature of an insurance against risk, sometimes the risk entailed by incompetence in the Governor, but sometimes also the risk entailed by ability, coupled, as it may be, with lack of experience or one-sidedness. A member of an Indian Council can hardly contend for the value of the institution without ill grace or impropriety, but I may fairly point to the success of the Madras and Bombay Governments. The system of Lieutenant Governorships is after all extremely recent, and if it has exhibited some examples of brilliant success, it has also exhibited one terrible miscarriage. But through considerably more than a century, the Governors in Council of Madras and Bombay have successfully conducted those Governments through difficulties scarcely less than the difficulties with which Governors General have had to contend in Upper India. I confidently assert that much of this success has been owing to the Councils. We have ourselves known some able and eminent Governors of minor Presidencies, and we have read of others; but it is impossible to read down the list of Governors without seeing that the great

majority were not men of any mark. If, however, the system of Governors in Council has enabled a series of mediocre men to carry on a difficult government for a century with great success as the ultimate result of the experiment, I really do not know what higher praise can be deserved by any political system.

If, however, a Council be good for Madras and Bombay, I venture to think it much more urgently needed for the Governor or Lieutenant Governor of Bengal Proper. The state of society in the minor Presidencies is comparatively uniform, and the questions to be dealt with are simple. In both Presidencies almost all the land is in the hands of a peasant proprietary. Except in a small part of Madras, the Europeans are collected in the Presidency towns, their interests scarcely ever conflict with those of the Natives, and in Bombay the moral gulf between the races is bridged over by the Parsees. But in Bengal the problems are complex, many-sided, and of extreme difficulty. There is scarcely a single question which has not a European side and a Native side, a proprietor's side and a tenant's side, which has not to be regarded from the point of view of the educated and progressive section of Bengálí society, and again from the point of view of rigid Hindúism. He will be a bold man who pronounces an unqualified opinion on any Bengal question, and not a wise one who thinks that many of them can be solved without adjustment and compromise. No one mind can be trusted to make proper allowance for all the elements in such problems. To put the case as strongly as possible, I cannot admit that, even if it can be predicated of a particular person that he would have saved half the lives lost in Orissa, he ought, therefore, to be left to himself as Governor of Bengal.

And here I may remark that I do not precisely understand what is meant by a Council of Secretaries. If it is a contrivance for shackling the freedom of advice by giving the Governor advisers who may be dismissed at his pleasure, or who may look to him for preferment, I think it is little to be desired. The principle on which a Council should be formed seems to me sufficiently plain. It should be in a position,

not only to give, but to obtrude advice; but it should not be allowed to compromise the policy of the Governor, or to obstruct a course of action once distinctly determined upon by him. The procedure which the Governor General and the Governors have to follow in overruling their Councils does seem to me somewhat cumbrous and antiquated, and I should gladly see it simplified by Parliament.

A Council organised in the usual Indian way has gradually and insensibly become something more than a merely consultative body. It has become a very excellent contrivance for dividing the labours of Government without at the same time entailing that wide separation of departments which is characteristic of the Cabinet system. In India, at all events, the boundaries of departments are to a great extent artificial, and much time, paper, and red tape are saved by a system which enables the Members of Government occasionally to overleap these boundaries. The present Lieutenant Governor,[1] than whom probably none of us have known a more conscientious worker, assures us that with a Council he may hope to dispose of the business of his Government—business of which the extraordinary amount, as disclosed in Mr. Grey's minute, is probably a surprise even to those among us who were most prepared for the truth.

As an English Member of Council, I may state my strong impression that the concession of a full government to Bengal proper will have a very wholesome effect on English public opinion, which knows little of Lieutenant Governors, but understands a Governor pretty well, and which will accordingly cease to impose on the Government of India a responsibility in respect of Bengal proper which it is absolutely impossible for us to discharge.

If effect be given to the views of the present Lieutenant Governor of Bengal, I do not think that we need fear to face the consequences, even though they should amount, in the words of his Excellency the Viceroy, to making the Governor General Governor General only over the North-Western Provinces and the Panjáb. It may be well, even in India, to state what is really implied in this. The Government of

[1] Mr., afterwards Sir William, Grey.

India could still retain an authority which is admitted on all sides to be real and effective over the two Lieutenant Governorships just named, one including 30 millions and the other 14 millions of people. It would still govern directly through Chief Commissioners, who are only deputies of the Governor General, Oudh with a population of 8 millions, the Central Provinces with $7\frac{1}{2}$ millions, and British Burma with rather more than 2 millions. Over the population of the Native States, amounting to nobody knows how many millions, the Governor General in Council would still exercise so much authority at all events as consists in preventing or punishing any conspicuous and flagrant wrong. He would further still retain by law the power of 'superintending and controlling' the Governors of Madras, Bombay, and Bengal proper, who rule together 70 millions of men, 'in all points relating to the civil or military administration' of their provinces, and of compelling those functionaries to obey 'his orders and instructions in all cases whatsoever' (3 & 4 Wm. IV., c. 85, sec. 65). More than all, the great centralised department of Finance would be in his hands, implying among other things an effective control of public works throughout the whole of India. When to these duties are added the supervision of a vast European and Native Army, and the conduct of the external and internal diplomacy of India, the Governor General in Council must surely be admitted to be at the head of one of the most colossal Governments of the world, even though the Local Government of Bengal should be allowed a greater degree of independence than is permitted to it at present. Indeed, this enumeration of duties does not state the whole truth. Is it not the fact that India is daily becoming more difficult to govern, more submissive certainly as regards physical resistance, but more exacting in its demands for good, precise, and politic government? It seems to me a man must be very unobservant who does not perceive that a time is near at hand when either the duties of the Government of India must be ill-discharged, or their sphere must be contracted. The present opportunity seems to me an excellent one for making timely provision against an inevitable future, by conceding comparative independence to a province

which, after all, from the very necessity of the case, is even now pretty much left to itself.

The Secretary of State intimates to us that it is scarcely possible to keep the question of the constitution of the Bengal Government apart from the question of the seat of the Government of India. I myself do not see that there is any insuperable objection to the permanent or prolonged presence of the Government of India in the territories of a Local Government which takes the form of a Governorship in Council, and I rather infer from Sir H. Durand's proposals that he is of the same opinion. Let us assume, however, that the higher dignity accorded to the Government of Bengal will render it more convenient that the Governor General in Council should be absent from Calcutta during at least part of the year, and that we are thus driven to discuss the evils or advantages of this absence. I have to ask whether it is really true that the system inaugurated by Sir John Lawrence of periodical migrations between Calcutta and Simla has failed. Is there the least ground for questioning Mr. Grey's opinion that it has added very greatly to the efficiency and despatch of official work? Has it not, at the very least, so far succeeded, that it may fairly be taken as the point of departure for further arrangements? These questions appear to me likely to be slurred over, through the natural hesitation which most of us feel in contending that what has been to some of us a personal benefit has also been a public advantage.

It must be borne in mind that every argument against Simla as an alternative capital has to be maintained in the teeth of the fact that for much of the last five-and-thirty years it has actually been the alternative capital, if capital be taken to mean the seat of the actual Government. Further, the actual Government of the country tended more and more to fix itself there. It is no mere conjecture when I assert that, if Lord Elgin had lived, he would never have come near Calcutta again. He had already spent one summer in Simla, and of the three which appeared to remain to him, he intended to spend two at Simla, and one at some other hill-station. The Commander-in-Chief had for some time lived at Simla almost exclusively. The truth is, the theory that Calcutta

was the capital was preserved only by a fiction, and a fiction so transparent, that, did I not know something of the power of fictions, I should wonder at men being blinded by it. The Governor General's Council remained there under a President invested nominally with the full powers of Governor General in Council. In point of fact, however, a division of business was made between the Governor General in the Upper Provinces and the President in Council at Calcutta on the principle of leaving to the latter all business which was of a simple, routine, or common-place character. Everything which was of importance went directly to the Governor General, and there was either a rule or an understanding that, if any matter which came before the President in Council assumed the least importance, it should be sent on to the Governor General.

The drawbacks on the position of Simla which Sir H. Durand has stated with undeniable force existed in former days with many others which have since disappeared. Yet they did not, in point of fact, prevent the gradual approach of Simla to the status of a capital, and they have not been hitherto assigned, at least not generally, as fatal objections to the resort of Governors General to the hills. Great evils are no doubt alleged to have resulted from the stay of the Governors General at Simla, but I have always heard these attributed to another incident of that stay, the severance of the head of the Government from his official and responsible advisers, the very incident to which the present Viceroy has applied a remedy. Moreover, it is to be remarked that Sir H. Durand urges against Simla the precise drawbacks which are in course of removal. The railway will be very shortly opened to Ambála;[1] before very long it will be completed between Ambála and Amritsar, and it is settled that it will be prolonged to Attok or Pesháwar. When these lines are somewhat further advanced, and when improvements now in progress on the hill road are finished, it appears to me that Simla will be fully entitled to the benefit of the argument which is usually employed in favour of Calcutta, as against Bombay and Puná, that modern facilities of communication

[1] It is now open to Kalka, about forty miles from Simla.

have rendered the precise situation of the capital unimportant.

Sir H. Durand has further objected that, through the migrations between Calcutta and Simla, two months of the year are lost. The time is greatly too long according to my experience, and I should hardly describe the days consumed in travelling as necessarily lost to official labour, but no doubt the experience of Members of Council concerned with other departments may give a different result. I venture, however, with all deference to my honourable and gallant colleague, to express an opinion that the argument involves a fallacy—the fallacy implied in testing an existing, by comparison with a non-existent, system. The two months supposed to be lost could only have been saved by a Government which remained the whole year in one place. But where is there such a Government in India? The larger number of the Local Governments in India move undisguisedly every year to the hills, with all or nearly all their Secretariats, and the fact is the more remarkable, because these Governments are not, like the Government of India, charged simply with the functions of superintendence and control, but stand in direct contact and relation with the people. More than this: every Government and every administrative functionary in the country is perpetually in movement during the cold weather or the rains; yet nobody ever thought of describing the time spent in locomotion as lost. Nor is this all. The system of the present Governor General can only be fairly judged by comparing it with that which it superseded,—that is, with a system under which the Governor General, separated from his Council for four years together, travelled at large during the winter and spent the rest of the year at Simla. I am happy to find myself in entire agreement with Sir H. Durand in my estimate of this exploded system, under which important papers sometimes went three times over, 1,500 miles, between the Governor General in the Upper Provinces and the Council at Calcutta I myself, judging from the experience of a single twelvemonth, believe it to be impossible for any human arrangement to have worked more perversely.

The Government of India is now abreast of its work.

When the present system began, it was heavily in arrear, and I believe there are no traces of a period at which it was not in arrear, although the work was infinitely less than it is now. The improvement is no doubt partly owing to a cause on the efficiency of which Sir H. Durand and I are agreed—the presence during four years of the Governor General with a Council which now practically consists of heads of departments. But I am sure it is also due to another influence—the influence of a fairly good climate on the quality and speed of our work.

Discomfort and disease have so long been the conditions of official life in India, and so much admirable work has been done under those conditions, that there is, I venture to think, a disposition in some minds to regard them as indissolubly associated with the good government of the country. Yet surely, in settling the question of the capital, it is unreasonable to leave out of account the discovery made thirty or forty years ago, that Nature has been less unkind to us than had been supposed, and that within the geographical limits of India there are climates in which the English race retains or regains its native vigour. I quite understand the necessity of guarding against the temptation to overrate the value of these climates, and to underrate the difficulty of utilising them. Yet there may be prejudices of the opposite kind; and the censors of resort to the hill climates should be sure that unconsciously they are not arguing as a conservative of the Spanish Indies may have argued against the use of the Jesuits' bark in fever, as a practice in itself effeminate, and calculated to excite ill-feeling in those who could not afford to purchase the new drug.

Everything is to be preferred to miscarriages of policy and administration, and if the interest and safety of the British Indian Empire do not permit its government to be conducted in a good climate, it must be conducted in a bad one. Yet the necessity is not the less a great public misfortune. It is most unfortunate, for example, that the area from which Governors General and Governors are taken should be narrowed. If there is one thing more certain than another, it is that the British Parliament, as it grows more popular,

will be more and more inclined to govern its great dependency directly through functionaries known to itself and sent from home; and every chance thrown away of mitigating the perhaps unreasonable fear of the Indian climate which prevails in England is a chance the less for the good government of this country. Again, the necessity of which I have spoken is unfortunate, because, though men bred in India may work well in extraordinarily bad climates, nevertheless they have thus much in common with men bred in England that they work better in better climates—more efficiently, because either more vigorously or more calmly. There is no economy which a Government can practise like the economy of its servants' health and nerve; it may be compelled to expend them on mere resistance to unfavourable physical conditions, but if it goes an inch beyond absolutely necessary expenditure, it is guilty of the most foolish form of prodigality.

Some very painful statistics of death and disease in the High Court during the last five years, which I read the other day in a minute of Mr. Justice Seton-Karr, are fatal, I am sorry to say, to Sir H. Durand's impression that the Court furnishes any evidence of the healthiness of Calcutta. I am, however, disposed to agree with him that on grounds of salubrity alone it would be hardly worth while changing the seat of the Government to any other place in the plains of India. My objection to Calcutta is precisely that of which I admit the force when urged against Simla. Neither Calcutta nor Simla has any claim to be considered a capital in the sense in which the word has generally been understood. One would suppose that the natives of a country to be governed from a capital would approach it with tolerable readiness, would take their fashions of life and thought to some extent from it, would be represented in the society which inhabits it, and would reflect the civilisation of which it is the exemplar. These tests of a capital are satisfied by Calcutta so far as regards Bengal proper; but, so far as respects the rest of India, Calcutta is remarkable for not satisfying a single one among them. Not even the most powerful of Indian motives, a grievance to be redressed, will in most cases bring a native of India, other than a Bengálí, to the dreaded city. Simla is

certainly not much more resorted to, but this is rather the fruit of ignorance than of fear; and Simla has, beyond doubt, the advantage of Calcutta in the number of experienced functionaries from all parts of India who come to it. I myself have seen more there in one month than at Calcutta in six, and this is only the natural result of the difference between a place to which everybody will come if he can, and a place to which nobody will come if he can help. But neither city seems to me to be a capital, unless a capital be merely the spot at which the Government may be for the time being.

It would be unreasonable that, after all I have said, I did not state affirmatively my own views of the best arrangements which could be adopted. I take the liberty of calling attention to an experiment which Lord Elgin was on the point of trying when he was overtaken by death. A standing camp had been established in the neighbourhood of Lahore, and there Lord Elgin intended to assemble both the Executive and the Legislative Councils. I venture to suggest that, at the beginning of the cold season, such a camp should be established near each of the great Native cities in turn; that the Supreme Government, descending from the hills somewhat sooner than at present, should be received in it, and should then proceed with such legislation as would more especially affect Native interests, reserving for Calcutta or Bombay, which would be visited afterwards, the discussion of the budget and of such provisions of the Codes as are intended for general application. Natives of India in any number would resort at that season to Lahore, Agra, Delhi, Lucknow, or Benares; and there could be no better opportunity for holding those congresses of governors, lieutenant governors, and chief commissioners, which have been recommended by high authority as the best preservative against that interprovincial friction which has become so annoying of late years. The Supreme Government of India would thus become peripatetic. If it be objected that there is no example of such a government, I answer first that the fact is not so, since almost all governments originating in the conquest of hot countries by persons born in a cooler climate have been, as a matter of history, more or less peripatetic, and that, even if the objec-

tion were well founded, the British Empire in India is too novel and extraordinary an experiment to be dependent on any precedents except those which its own experience furnishes. I would ask whether such a system as I have described would, in truth, be more than the old progresses of the Governor General, cured of one particular vice, and adapted to the circumstances and condition of the India of the present day. The cost of time and money entailed by these movements might, in my judgment, be reduced within narrow limits by organisation and forethought. Much of the public and private expense—the first, anything but large—and much of the loss of time entailed by the system of the last four years, have been attributable to its provisional character.

INDIAN UNIVERSITIES

JULY 29, 1868.

I HAVE kept these papers some little time, because, as the proposal which they convey is avowedly founded on condemnation of the University of Calcutta, of which I was for four years Vice-Chancellor, I wished to be sure that I was not viewing it in the light of my natural prejudices. I will say at the outset that some of the remarks of the Panjáb Educational Officers on the existing course of the Calcutta University seem to me to deserve the consideration of Government on their own merits. Much of their criticism appears to me extremely captious; but while I think that the defects which they pretend to point out are for the most part purely imaginary, I have never been blind to the indirect tendency of the mode of examination prescribed by the University, its tendency to prevent the acquisition of a certain amount of knowledge (it will be at best a very moderate amount) by students who cannot master a Western language. It may be worth the while of the Government of India to consider whether (so far only as concerns the more backward provinces of the Bengal Presidency, such as the Panjáb and parts of the North-West) some importance ought not to be attached to the suggestion that candidates for the Entrance Examination should have the option of being examined in their verna-

cular, and that the same option should be extended to candidates for the First Examination in Arts, so soon as proper evidence can be produced that satisfactory vernacular text-books are available. I must admit that this time is, in my judgment, far enough away, when I read the list of subjects prescribed for that examination. I have no right to speak with confidence of Oriental languages; but I venture to think that those who believe they can easily be made the instruments of conveying knowledge (by which I mean positive and not literary knowledge), have scarcely paid sufficient attention to the long and laborious process by which even the Western languages have been so fashioned as to admit of their becoming vehicles of accurate thought. Still it is possible that something can be done, and the possibility may deservedly be weighed by the Government of India. It is true that the law does not give the Government a direct control over the University. But I feel absolutely sure that the Syndicate and Senate, although the former body has apparently declined to modify its system in the particulars above referred to for the whole Presidency, would receive with all possible deference a suggestion of the Government for its modification in respect of the less advanced provinces.

The establishment of a new University at Lahore is proposed by the Panjáb authorities, partly as an alternative measure to changing the system of the Calcutta University, and indeed it is mainly advocated by them on the score of defects in that system. But there is another consideration which appears to have powerfully influenced some of them. They are under the impression that there is something necessarily and naturally imperfect in a collegiate system, such as alone exists at present at Lahore, and that teaching *colleges* can never be wholly successful unless they are developed into teaching *universities*. This view is strongly taken by Mr. Aitchison,[1] who says 'the main object of a University is not so much to test what students know as to guide them in their studies, and train them in proper methods of learning.' I own I consider the argument as dealing mainly with words. 'University' and 'college' meant originally precisely the

[1] Now Sir C. U. Aitchison, K.C.S.I.

same thing—a corporation; and, taking the usage of modern Europe as a whole, the words have been used quite interchangeably. The true distinction is not between universities and colleges, but between teaching bodies and examining bodies. There have been colleges which taught little or nothing, and existed principally for the purpose of testing knowledge acquired elsewhere, as, for example, the Colleges of Physicians and Surgeons. There have, again, been universities where the teaching was of the first order, but where the function of examination was either not exercised at all or very inefficiently. Such were the Scottish universities forty or fifty years ago, some among which actually sold their degrees, even their medical degrees, for money. If, however, Mr. Aitchison and those who agree with him mean that the teaching function and the testing function improve one another when they are blended, I can only say that my experience and observation point in precisely the opposite direction. Teaching institutions succeed because they are served by efficient teachers, and the name by which they are called is absolutely immaterial. But, on the other hand, the process of examination or testing results is distinctly injured by identifying the teaching and examining bodies. I venture to say that in the German and Scottish Universities the testing process is even now very far from being on a level with the teaching. In the English Universities, examination is almost wholly disjoined from teaching, the universities almost exclusively undertaking the first, so far as concerns degrees, the colleges conducting the practical education of the student. While the success of the colleges at Oxford and Cambridge is of course matter of opinion, it is by the Universities of Oxford and Cambridge that examination has been developed into what may almost be called a scientific process; yet one small blot on the system cannot be denied—the shade of suspicion, which occasionally rests on an examiner, if not necessarily examining his own pupils, yet sometimes testing the knowledge of students trained on a system to which he is known to be wedded. The most satisfactory examining body I know is the University of London, which has performed the difficult feat of inspiring a number of teaching institutions, separated

by differences of religious creed, with the most perfect confidence in its impartiality, as well as its thoroughness. I say nothing of the University of France, since, though it is a purely examining institution and has the highest reputation, I do not profess to be sufficiently acquainted with it.

I have insisted on the distinction between teaching bodies and examining bodies as being the only one which has any reality, because it certainly appears to me that a plan for a university at Lahore amounts to a proposal that the Panjáb Educational Department shall be allowed to test its own results, instead of having them tested by an external body much larger than itself. Doubtless there are some of the results aimed at by the Panjáb authorities to which the Calcutta University applies no tests whatever, because it does not consider them of any value; but still, on the whole, the ultimate aim of teaching in the Panjáb must be much the same as in Lower Bengal, and by this project the Panjáb Government seems to me to propose that its own teachers shall test the degree of their own success. This is surely very objectionable. Even in Calcutta we feel the difficulty created by the comparative smallness of the educated class outside the teaching body, and are too often driven to take our examiners from among educational functionaries who, though they may not exactly be set to examine their own pupils in the very subjects in which they have instructed those pupils, have nevertheless necessarily formed opinions about them in their own lecture-rooms. This difficulty will be much greater in the Panjáb. The advanced students are not numerous. The teaching body is but small, and I think it may be said without offence that, so far as the higher education is concerned, it has not been conspicuously successful, perhaps not wholly through its own fault. From this body the gentlemen who will confer the degrees of the Lahore University will have to be selected for a long time to come, for though assistance may occasionally be procurable from outside, functionaries in the Lower Provinces are too busy to be spared for Lahore; and I fear that, if their reports were unfavourable, they would not be summoned inconveniently often. Nor is it the only drawback on the project that the educational officials in the

Panjáb would become judges in their own cause. The judgment pronounced would be ostensibly the same as the judgment pronounced by the Bengal examiners on the Bengal students. A B.A. or LL.B. of Lahore would rank with a B.A. or LL.B. of Calcutta. Now a Bengálí Bachelor of Arts or Laws may be a young man who has an unpleasantly good opinion of himself, but he has really proved that he possesses a considerable amount of genuine knowledge. These degrees are coming to be more and more recognised by the Government, the High Courts, and employers of various kinds as guarantees of ability, and, indeed, if they did not possess an ascertainable value, few Natives would submit to the laborious preparation required for them. But now a new university is to be established in the Bengal Presidency with the power of conferring degrees colourably the same, apparently even LL.B. degrees, which admit to the pleaderships of the High Courts without examination, and medical degrees, which carry with them a license to practise. Already some inconvenience is experienced through the competition of Madras and Bombay degrees, but those universities are at a great distance, and they are founded on the same general principles as the Calcutta University. But the Lahore University avowedly repudiates those principles or many of them. I agree with Sir H. Durand that it is not easy to frame a clear notion of all its objects, but it is at all events admitted that some of them are not educational but political. In some way or other, though I am not altogether able to say in what way, the Panjáb nobles are to be conciliated by the quality of the knowledge diffused, or by the methods of imparting it. Even, however, if I could be sure that the knowledge tested were of the same description as that tested by the University of Calcutta, I cannot, for reasons above stated, feel any confidence in the sufficiency of the tests. I venture, therefore, to express a hope that if this University be established it will be compelled to give some new name to its grades, and will not be allowed to put into circulation coin which I will not call base, but which for some time to come will be heavily alloyed, stamped with the same mint-mark as that issued by the Calcutta University.

If there is anything in the argument that the effect of establishing the Lahore University will be to take away from the efficiency of examination, it deserves the more serious consideration, because the subsidy of the Government is expressly asked on the grant-in-aid principle; and if I am right, the very condition of a grant-in-aid—a stringent system of testing results—will be wanting. As to the results themselves, I have said before that I have failed to gather from the papers what the expectations of the Panjáb Government are. In the first place, the Panjáb Government does not appear to me to distinguish clearly between the results, no doubt considerable, which might be obtained by improved teaching in the Panjáb colleges, and the results, very scanty at most, which might be looked for from a change in the form of the examination papers. Next, the Panjáb authorities seem to have a generally misty conception of what they want and of what they intend to aim at. One thing which, as it seems, may be hoped for, is the improvement of the Panjáb vernaculars, that is, Panjábí and Pashtu. Now, undoubtedly direct efforts have before been made to bring about the so called improvement of old, exuberant, and cultivated languages; but this has been managed by forbidding the use of all words except those sanctioned by the best writers. Rude languages, so far as I know, can only be improved by the growth of ideas among the people who speak them, or (as in the case of Bengálí) by contact with other languages which have long been used as media of thought. The proposal to found professorships for the improvement of rude languages, or at all events to make that improvement a subject of direct study and teaching, seems to me a very extraordinary one and likely to lead to very singular results. I should say that the production of a dialect like the 'Pigeon English' of Hongkong and Canton is a not improbable fruit of the experiment. Again, in what is the cultivation of Oriental literature by the Lahore University to be different from, or superior to, the cultivation of the same literature by the colleges in Calcutta and its vicinity? First among the objects of the new institution is placed 'encouragement to the enlightened study of Oriental languages and literature.' What is the meaning of

'enlightened?' The only meaning I can attach to it, and I presume the meaning which the Government of India was intended to attach to it, is that the principles of Western philology and criticism are to be applied to Eastern language and literature. But, if this be so, the object is the last which would call forth the enthusiasm of the Panjáb Chiefs, or rather of the classes from whom they take their opinions. Can anybody doubt for a moment that a Pundit learned in the native fashion would (if he knew anything about them) regard the labours of the great Calcutta Sanskrit scholar who has made native erudition famous in Europe as being not simply worthless but sacrilegious? Can anything be fancied more offensive to a devout Muhammadan, possibly with a latent leaning towards the Ákhund of Swát, than a really critical sifting of his sacred books? The fact is, the application of modern critical and philological principles to languages in which a sacred literature is embodied is essentially a rationalising and destructive process, and so it has manifestly proved in Lower Bengal. The difference in the point of view between the Panjáb Government and the subscribers to the University is brought out with almost ridiculous clearness in the correspondence with the Mahárájá of Cashmere. The Mahárájá subscribes (and indeed thanks God that he is allowed to subscribe) 'one lakh Srínagri rupees' to a University which has for its object the propagation of the vernacular literature and sciences; in other words, of the science which places the world on a tortoise and of the literature which (whatever be its intrinsic poetical value) is taught according to methods which I do not think it presumptuous to describe as a multiplication a thousandfold of the worst educational follies from which we are escaping in England. But the Panjáb Government in thanking the Mahárájá accepts his donation for the 'propagation of literature and science through the Indian tongues.' It is difficult to conceive objects more different than those for which the money was given and those for which it was received. The fact is, the Lahore University, considered as a teaching institution, must either become a laboratory for the production of Maulvís and Pundits, or else, from its freer use of vernacular instruction, it will ultimately shock Native

prejudices far more acutely than the institutions in Bengal of which the teaching is in English.

I am very sorry to say anything in apparent disparagement of those Native sympathies which are alleged as a reason for consenting to the Panjáb scheme. But, I must say, I think we ought to be on our guard against alleged bursts of Native enthusiasm in the Panjáb. Even in my time in India I have witnessed several such bursts, as, for example, in favour of giving a testimonial to Colonel Elphinstone for his services in the cause of female education. We ought to know what solicitation there has been, official or non-official, direct and indirect, and what representations have been held out to the subscribers. There are many reasons at the present time why several classes in the Panjáb should be willing to contribute freely towards any object which functionaries appear to have at heart, and the liberality of the Mahárájá of Cashmere is perfectly intelligible quite apart from his misconception of the object for which he subscribed.

So far as the Panjáb Educational Department complains of certain peculiarities of the Calcutta course, I think its representations deserve attention. For the rest, it seems to me that this scheme, instead of coming before us in so extremely magnificent a form, should have been submitted in the more modest guise of a proposal to improve the machinery for the higher teaching in the Panjáb colleges. In this view the suggestion of the Delhi college functionaries that the subscribed money should be divided between the Delhi and Lahore Colleges and devoted to the above purpose appears to show great good sense.

Notwithstanding the foregoing minute, a university was established for the Panjáb by Act XIX. of 1882.

CASHMERE: SUCCESSION OF COLLATERALS

AUGUST 4, 1868.

IT was proposed to promise the succession to the State of Cashmere to unadopted collaterals of the reigning Mahárájá. Mr. Maine wrote as follows:

While I think that the opinion of His Excellency the Viceroy as to the services of the Cashmere House ought to be

regarded as conclusive, and while I consider it most expedient to take some step which may reassure the present Mahárájá after the persistent attacks made on his Government, I feel myself compelled to agree on the question of principle with Sir Henry Durand. I cannot doubt that this concession, if made, will almost immediately become known to the other Native chiefs of India, and will be made the foundation of universal demands for similar indulgence. If it be true that the minutest distinction accorded at a Viceregal Durbar makes its way to every Court in India, and is cited as a precedent or a grievance on the next available occasion, how can we possibly suppose that the establishment of a new principle of succession in a Hindú House will be regarded as exceptional and as affecting that House alone? The Cashmere dynasty rules a wealthy and powerful State, but the claim to consideration appears among Native chiefs to rest not more on extent of dominion than on antiquity and splendour of family descent. How can we deny to families whose antiquity inspires an almost religious reverence that which we concede to a dynasty whose origin is extremely modern, and viewed, I believe, with anything but respect?

The existing system of succession among quasi-sovereign Hindú princes in India has the advantage of extreme simplicity. The right of adoption in default of heirs of the body—now firmly secured to them—amounts to a power vested in the reigning chief of selecting a successor from among his collaterals. To take a very famous illustration, it is the rule of succession which practically obtained in the early Roman Empire, though in that case the power of selection could be exercised not only by adoption but by will. If we once depart from this simple principle, I own that, from a purely legal point of view, I cannot look forward without dismay to the sea of doubt on which we shall be launched. What is the rule of succession to a Hindú sovereignty among unselected collaterals? The answer is that nobody knows. Not only does the general Hindú Law of Succession to private property give us little help in solving the question, but it rather confounds our ideas, because (putting aside some unimportant exceptions) it is essentially a system of class-succes-

sion excluding primogeniture. In successions to a Hindú sovereignty does the collateral who is nearer to the founder of the House exclude the collateral who is nearer to the last reigning chief? Does a nearer collateral connected through females only exclude a more remote collateral connected through males? A man may of course have an opinion on these two points founded on supposed analogies in Hindú or even in English law; but in truth nobody can give a reply with confidence or certainty. It happens, however, that out of the two questions above suggested grew the largest and bloodiest wars, or rather series of wars, in which the English monarchy has been involved. The fact is that nothing is more arbitrary in itself, and nothing has been more gradually settled, than the system of collateral succession to European sovereignties; and it is no slight thing to propound the same set of problems for decision in India.

I am informed that in Oudh, where the property of certain families claiming a 'gaddi,'[1] and probably older than most of the reigning Houses of India, descends indivisibly, there is no pretence whatever of the existence of any general rule of collateral succession applicable to such a case, but each family professes to have a complete set of provable family usages governing its own successions. It is extremely improbable that the reigning Hindú Houses can produce proof of any such customs, partly because of the virtual universality of the system of adoption, partly on account of the recent accession of several of them to sovereign power and their previous obscurity.

It may be said that the British Government will decide between the conflicting claims of collaterals. But unless it be distinctly stated that no collateral is to succeed as of right, the promise to allow collateral succession will be regarded as a promise to respect the right of collaterals to succeed, and each collateral will be practically invited to make preparations for pressing his due claims. I venture to assert, too, that, in ninety-nine cases out of a hundred, the future British Government of India, having no reason *a priori* for preferring one collateral to another, will select the one whom it supposes to

[1] The seat of rank or royalty.

be legally entitled to succeed, and the question of legal right will be raised after all. But if any other candidate seems to a portion of the people to have a better claim than the nominee of the British Government, what security have we against an outbreak of partizanship similar to that which, in spite of all the influence of the British power, has just plunged a miserable little Katák State in war?

One very unfortunate result of diminishing the inducement to Hindú princes to adopt will be that minorities will obviously become much rarer. An adopted successor is almost invariably a child; a collateral successor will almost invariably be a grown man. It seems to be generally admitted that there is no happier episode in the modern history of Native States than the minority of the chief. The British Government, temporarily assuming the administration in a tutelary capacity, secures for the young prince the best education available and for the people the best possible combination of Native and British institutions, without exposing itself to the suspicion of intended annexation, and without placing itself under the temptation to go too far in anglicising the country. Nobody denies that the best-governed Native States owe their superiority to a minority wisely dealt with.

I cannot help believing that the just claims of the Mahárájá of Cashmere might be met in a simpler manner. Advantage might be taken of the policy so conspicuously inaugurated in Mysore. His attention might be directed to what has taken place in Mysore as a proof of the earnest wish of the British Government to maintain Native States. And he might be assured in decided language of the strong sense which the British Government entertains of the services of his family. Putting the two together, he could scarcely fail to draw the conclusion, which would certainly be a sound one, that if he should fail to adopt, he would be succeeded by one of his family. But the inconvenience of a precedent would be avoided.

THE RIGHT TO CEDE BY SANAD PORTIONS OF BRITISH INDIA

AUGUST 11, 1868.

THE point of law discussed in the following minute was first considered by Mr. Maine in 1866, with reference to the transfer of certain villages to the Thákur of Bhaunagar. It came before the Judicial Committee of the Privy Council in *Dámodar Gordhan* v. *Deoram Kanji*, L.R. 3 Ind. App. 102 S. C. Bom. 367, and before the High Court of Allahabad in *Lachmí Náráyan* v. *Rájá Partáb Singh*, 2 All. 1, and was decided in accordance with the views of Mr. Maine. Mr. Forsyth's *Cases and Opinions on Constitutional Law*, 1869, pp. 182–8, may be referred to for information, if not for guidance, on the subject.

Rather more than a year ago, an opinion given by the Advocate General to a private client attracted the attention of Government. Mr. Cowie had apparently been consulted on the question whether a particular District Court in British India retained jurisdiction over certain lands comprised in territory which the Governor General in Council, on behalf of the Queen, had transferred, or affected to transfer, by sanad to the Nawáb of Rámpur, to be held by him in the same way in every respect in which his patrimonial dominions are holden. Mr. Cowie advised that the effect of the transfer by sanad was merely to assign the revenues of the territory comprised in the sanad to the Nawáb, who thus became in respect of that territory a jágírdár in British India, and it followed that the constitution of the jágír in no respect impaired the jurisdiction of the British Court. The sanad purported unquestionably, not to create a jágír, but to transfer territory in sovereignty; there had, however, been irregularities in the transaction, which had been animadverted upon by the Secretary of State, and hence it was at first supposed that the Advocate General considered some of these irregularities to have been so formidable as to prevent the declared intention of Government from taking effect. He was, however, requested to state the grounds of his opinion, for the information of the Governor General in Council.

The reply of Mr. Cowie has been received, and it proves to be of a much more serious nature than had been expected.

He waives all consideration of accidental irregularity, and he is satisfied to regard the sanad as if it had emanated directly from the Crown. He affirms that, even if it had so emanated and had clearly indicated an intention on the part of the Crown to transfer sovereign rights, it nevertheless could not have effected more than a transfer of the Government revenue. The Officiating Secretary, the Under-Secretary, and the Assistant-Secretary[1] have pointed out the extremely grave consequences of this doctrine. Many, if not most, of the rewards of loyalty conferred since the mutinies on Native Chiefs have consisted in gifts of territory made through the instrumentality of sanads. The portions of territory so transferred have been treated by the Chiefs as an accession to their own dominions. They would assuredly regard with extreme disgust an announcement that they had merely been constituted donees of the revenue, and it is probable that any attempt to withdraw the instrument of gift and to exchange it for one of a different character would be viewed by them with great anxiety and much suspicion.

I confess I do not gather clearly from the Advocate General's opinion whether he questions the right of Her Majesty to alienate portions of her Indian dominions in favour of Native chiefs, or whether he simply denies that such alienation can be effectually made by means of a sanad. While I lean to the belief that Mr. Cowie means merely to deny the latter proposition, I think it right to say that, in my humble judgment, the power of the Crown to alienate portions of Indian territory cannot be questioned. Even as regards dominions of Her Majesty which are not in the peculiar position of British India, it is now too late to deny that the Crown may cede parts of them, subject to the risk of Parliamentary impeachment incurred by those who have advised the improper cession. But, in respect of Her Indian dominions, I venture to think that the Queen has Parliamentary sanction for any alienations of territory she may think proper to make. In laying this down, I follow out the line of argument pursued in a famous minute of the present Chief Justice of Bengal, which has had great influence on the public law of

[1] In the Foreign Department.

India. Sir Barnes Peacock, in contending that the Indian Government did not possess any inherent sovereign rights which entitled it to legislate for newly-acquired territory otherwise than through the legislative machinery provided by Parliament, was pressed with the question how the Indian Government came on his principles to have the power to acquire territory. His answer was that Parliament, in permitting the East India Company through the Indian Government to keep up an army and (at that time) a navy, independently of the annual Mutiny Acts, must be taken to have contemplated war in India, and the consequences of war, among which was acquisition of territory. If, however, this reasoning be sound, the consequences of unsuccessful war, or of wars of doubtful or balanced success, must be deemed to have been contemplated by Parliament also, and hence the Indian Government must be taken to have the power of ceding and exchanging territory, as well as of acquiring it. So also, as it appears to me, this Government must be regarded as having the right of strengthening the general political system of India by cessions, transfers, and exchanges of territory in time of peace. It does not appear to me reasonable to limit this right, as in one sentence Mr. Cowie would seem to limit it, to arrangements which are the immediate sequel of a state of war. We assuredly do not transfer territory to Native Chiefs under any impression that we secure better government for the people inhabiting it. All such transfers may be said to have more or less relation to wars, past or future. They are either intended to reward proved loyalty, or to render the Empire more compact and stronger for resistance, if not for aggression. The argument of Sir Barnes Peacock which I have cited appears to meet Mr. Cowie's objections to the creation of new tribunals and the introduction of new laws in the ceded territory, otherwise than by Parliamentary legislation. If we have the implied sanction of Parliament to the acquisition of territory, whereby the sphere of Indian legislation is enlarged and the power obtained of establishing new tribunals and introducing new laws, it seems to follow that we can go through the converse operation and by cession of territory obliterate the courts and laws which are the creation of Indian legislative authority.

As, however, I said before, I incline to the belief that the Advocate General does not intend to deny the power of the Crown to transfer portions of Indian territory in sovereignty or semi-sovereignty, but only to deny the power of effecting the transfer by sanad. I understand him to maintain that a treaty is indispensably necessary for an effectual alienation, and that a sanad is as inappropriate as would be, in European international transactions, an English conveyance with its multiplied reference to feudal rules and to the Statute of Uses. Now, a sanad is undoubtedly the instrument by which the Indian Government ordinarily grants land or revenue to one of its subjects; and I quite admit that in a case where the intention to alienate sovereignty or to dispose of revenue was doubtful, Mr. Cowie's reasoning might be entitled to weight. The sanad, however, which is before us, clearly recites an intention to confer the same rights in the transferred territory which the Nawáb enjoys over his inherited dominions, and hence Mr. Cowie must be assumed to make everything turn on the employment of a sanad instead of a treaty. It must be recollected, however, that in international law and in the quasi-international law applicable to India, facts are everything, and the fact seems to be established by the Secretary's notes that sanads have been about as frequently employed as treaties in adjusting and declaring the relations of the Native Chiefs to the British Government. It was in fact the ordinary instrument of contract, grant, or cession used by the Emperors of Hindústán, and so it has descended to us. The most important privilege ever conceded by the British Government to Native princes—the unqualified right of adoption—is solely secured by sanad, and parts of the territories even of chiefs so considerable as the Mahárájá of Patiála, are held under no other instrument. It would seem, too, that sanads are not necessarily unilateral. They often impose on the recipient obligations which he is taken to have assented to through the act of acceptance. They appear in fact to have no distinctive peculiarity except that they are couched in the tone of a superior addressing an inferior. . . . So far, however, from being anomalous, the assumption of superiority in a sanad is highly appropriate and natural in

India; and I am convinced that examples of a similar assumption having become a common form might be produced in Europe, if the instruments were examined to which the quondam Emperors of Germany were parties.

I venture, however, to think that the doctrine of the extreme importance of the distinction between a treaty and a sanad betrays a deeper misapprehension. If European principles are to be applied to the interpretation of the relations between the Indian Government and the Native Chiefs, they must rather be the principles of the law of nations than those of English municipal law. Now, while it is very natural in an English lawyer, who is accustomed to rights and duties flowing directly from conveyances, to attach the greatest importance to their form, it cannot be said that international law attributes any such importance to documents. International law has 'modes of international acquisition' known to itself, which are set forth at length in the text-books (for instance, Phillimore, vol. i. 235–315); but, following Roman law, it regards documents, not as modes of acquisition, but as evidence of acquisition according to a particular mode. It is not, I think, presumptuous to affirm that (though the expression may sometimes be found in writers of some authority) it is in strictness incorrect to say that territory is acquired by treaty. By a treaty the high contracting parties may bind themselves to effect or suffer an acquisition of territory after one of the modes known to public law; or, again, a treaty may furnish irrefragable evidence that such an acquisition has taken place, or it may supply binding admissions of the fact. But acquisition or alienation cannot be said to be effected by the treaty itself or by any other document. From these principles appears to flow the broad doctrine of Wheaton that the form of a treaty is immaterial, and it would seem to be a legitimate conclusion from them that there was nothing inappropriate in the sanad given to the Nawáb of Rámpur. Strictly speaking, the alienation was effected by the delivery of the territory to the Nawáb. The sanad, reciting the intentions of the Crown, supplied what in Roman and international law is known as the *justa causa*.

I am compelled, therefore, to dissent from the Advocate

General's opinion that such sanads as that given to the Nawáb of Rámpur confer merely a right to the revenue of the territories comprised in them, even when emanating from the proper authority. I think they effectually confer over that territory such measure of sovereignty as they purport to confer. But Mr. Cowie is the constituted legal adviser of this Government, and hence the case, which is of the greatest importance, must go home for the opinion of the law-officers of the Crown.

TRIAL OF EUROPEAN BRITISH SUBJECTS UNDER JURISDICTION ASSUMED BY NATIVE STATES

APRIL 19, 1869.

THE legal question in this case is quite distinct from the political question, and altogether subordinate to it.

I entertain no doubt whatever that the Travancore State, so long as in any sense it is not part of British India, has jurisdiction theoretically to try European British subjects for offences committed within its boundaries. The notification of January 10, 1867, was issued under the authority of an Act of Parliament,[1] but the statute and the notification (the issue of which was a quasi-legislative act) no more take away the inherent jurisdiction of Travancore than the common and statute law of England, which permit the trial by English courts of Englishmen committing crimes abroad, take away the inherent right of France or Prussia to try Englishmen by their own courts for offences committed within their jurisdiction. I do not think that Mr. J. D. Mayne, of Madras, has over-stated the truth in laying down that Parliament has not the power to legislate away the jurisdiction of Travancore. What Parliament *can* do, if it chooses, is to compel the executive to annex foreign territory to the Queen's dominions or to put pressure on the foreign state and force it to abstain from trying British subjects—and, of course, in the case of a Native state, this pressure would be irresistible.

But the political question is of a very different nature.

[1] 28 Vic. c. 17, s. 3. The notification under which the High Court at Madras now exercises criminal jurisdiction over European British subjects of Her Majesty, being Christians, resident in Travancore is dated Aug. 9, 1875, No. 119 J.

There is nothing to prevent our regarding the statute and the notification as intimations by Parliament and the Government of India of an opinion that Native States *ought* not to try European British subjects. Perhaps, however, it would be more correct to say that the statute was passed and the notification issued in the belief that Native States did not, as a matter of fact, try Europeans or claim to exercise their inherent jurisdiction over them. The simple question is whether they shall be allowed to do so. I readily admit that, if any state might be allowed to exercise this power it would be Travancore. But an extreme case must be tested by an extreme case. Can we afford to permit even the Travancore authorities to execute a capital sentence on an Englishman? As regards the great majority of Native States, the criminal system is so rude that the public opinion of Englishmen, whether here or at home, would never permit its being put in force against one of themselves. There is, moreover, as it seems to me, one fatal objection to allowing any Native state to try and punish Europeans. Not one of them—not even Travancore, I suspect—has a prison in which a European could work out his punishment. Thus the sentence on a European would bear no proportion to the quality of his offence.

My own view is that the Government of Madras should be told to intimate to Travancore that, without denying its abstract right to try Europeans, or questioning the merits of the judicial system there established, we think there are many reasons why Europeans charged with offences should be sent to Madras for trial. We might point out the great importance of trying Englishmen by a procedure to which their countrymen are accustomed and with which they are satisfied, and we might add that this consideration has up to this time prevented our giving our own Mufassal courts jurisdiction over them. We might express a doubt whether sentences of any gravity on Europeans could be worked out in Travancore prisons, the British Government in its own dominions having to move them to selected places of confinement. But we might promise every aid and the utmost activity in bringing offenders to justice.

SELECTION AND TRAINING OF CANDIDATES FOR THE INDIAN CIVIL SERVICE

NOVEMBER 12, 1875.

I HAVE gone through this mass of papers in the order in which they are put together, that is, with the minutes of the members of the Government of India at the end, and I find that my results as to the preponderance of opinion on certain points tally very closely with those of the Viceroy. For the purpose, then, of judging towards what conclusions the gentlemen consulted in India incline, it will be enough to consult the appendix to Lord Northbrook's minute.

There seems to me to be a very decided preponderance of opinion on two points:—

1. Against disturbing the system of open competition by which candidates for the covenanted Civil Service are selected, and even against any serious modification of the examination. The Viceroy, however, favours the proposal to add jurisprudence and political economy to the subjects in which the competitors are examined.

2. In favour of calling in the universities to aid in the training of candidates for the Civil Service, either before or after selection.

The virtual unanimity on the first point is, no doubt, owing in part to an assumption that the competitive system is not under any circumstances likely to be disturbed, and in part also to the large proportion which civilians selected by competition now bear to the rest of the Civil Service. Those, however, whom the system inspires with most distrust would probably allow that it must be maintained, in the absence of any strong opinion in India unfavourable to its working. As regards a certain class of imputations which have been directed against it, I venture to recommend careful attention to notes E, G, and H, printed at pages 35 and 36 of the correspondence between the Secretary of State and the Civil Service Commissioners. It may be observed, that the table contained in note E, which classifies the candidates of fifteen years, does not probably express the whole truth. There is reason to believe that the number of candidates answering to

the higher classes in the table is progressively increasing, and the number of those belonging to the lower progressively diminishing, the latter having been at one time in much greater proportion than at present. This appears to be a consequence of the fact that preparation for the competitive examination is extremely costly, and, like most things in our day, is steadily becoming costlier. It may be remembered that a late colleague of ours, Sir George Campbell, condemned the competitive system, not on the ground ordinarily taken, that it favoured the lower classes at the expense of the higher, but on the exactly contrary ground that it tended to make the Indian Civil Service a monopoly of the rich. Whatever be the force of the objection, the assertion on which it rests seems to me to be not so very far from the truth.

On the second point, the manner in which advantage should be taken of the desire of the universities to share in the education of our candidates, I regret to say that I do not agree with the Viceroy. Lord Northbrook has evidently bestowed much thought and care on the subject, and I differ from him with unfeigned hesitation. But I have had a long experience of both the older universities, and some experience of the present mode of training the selected candidates; and there may, besides, be some convenience to the Secretary of State and the Council to have the only important issue which they have to decide raised with considerable distinctness.

Lord Northbrook proposes that the earliest age at which a candidate should be allowed to compete should be 19, instead of 17 as at present, and that the latest age should be 22, instead of 21 as at present. He would send all the selected candidates to a university for a single year, leaving them (para. 25) to choose the university to which they are to be attached provided that it satisfied certain conditions, and allowing this university to test their progress in their special studies. The curtailment of the period now given to special study he would apparently compensate by transferring the subjects of jurisprudence and political economy from the special to the general or competitive examination. The proposal wears a very strong resemblance to that of Mr. Jowett, the Master of Balliol.

On the other hand, I would lower the maximum age of competition from 21 to 20, and I frankly own I would lower it to 19, if I had my own way. I would leave the minimum age at 17, as at present. I would either compel the selected candidates, or offer them strong inducements, to proceed after selection to universities chosen by themselves, under the same conditions as those suggested by the Viceroy. I would, however, send them thither for two years at least, and not for one. For the present, at all events, I would keep the examinations of the selected candidates in the hands of the Civil Service Commissioners, under arrangement with the Secretary of State; but I would somewhat modify the subjects of examination, and I would fix the times of examination at such periods of the year as would not interfere with residence at the chief universities. My proposals do not widely differ from those of the Dean of Christ Church and of the Committee of Council at Oxford.

I proceed to give my reasons for dissenting from the proposals of Lord Northbrook, and for advancing my own.

I must confess I should regard with some dismay a system of keeping many hundreds, and perhaps thousands, of young Englishmen, the ablest of whom are intended for the sternest practical duties, and the most active life, working up to 22 at subjects which do not directly contribute to success or efficiency in the career which they are attempting to enter, or indeed in any career except a few of an exceptional order. Such a system, as it seems to me, could only be justified by some such unquestioning belief in the value of the studies prescribed for the competitive examination as existed during the Middle Ages in the value of the Trivium and Quadrivium. Lord Macaulay and his colleagues assuredly held no such opinion of these studies: still they expressly defended their scheme, not on the ground that the subjects contemplated for the competitive examination were absolutely the best, but on the ground that they were, as a matter of fact, studied by the best, the intellectually ablest, young Englishmen. If these subjects were alleged to be chosen not for their historical place in English education, but for their absolute intrinsic merits, the choice would be open to much criticism. Though it be a

vulgar and ignorant prejudice that Greek and Latin are useless, it is not the less certain that much of their hold on our universities, colleges, and schools is a 'survival' from the fifteenth century. Nobody nowadays, I presume, if he were arranging the course of study in the Universities of Cambridge or Dublin for the first time, would give quite the same importance as at present to pure mathematics, or would allow mathematical studies to be so much divorced from study of the operations of nature. Moral and mental philosophy are expressly made subjects of examination because they are said to take, at the Scottish Universities, the place of Greek, Latin, and mathematics at the English; yet they are full of disputed and unsolved problems, and, as commonly treated, abound with reasoning which is far from rigorous. For myself, too, I must confess to the most profound distrust of an examination in natural science, which tests knowledge solely by the reproduction of statements found in books. The truth is, that any system of keeping young men working at 'general,' as distinguished from 'special,' studies up to 22 is only justifiable when the 'general' studies are really 'special,' as is the case with the comparatively few who will carry them further by discovery, or in the case of the not inconsiderable class at Oxford and Cambridge, who will make professional use of them by teaching them to others. It seems to me that this is clearly recognised by the universities themselves, since the manifest tendency there is to specialise study. At Oxford, a man who has passed the examination called 'Moderations,' which he may do no long time after entrance, may practically take leave of pure Greek and Latin scholarship, and devote himself to philosophy, mathematics, natural science, history, or jurisprudence. At Cambridge, the questions now put to candidates for honours plainly favour special knowledge, and a number of new 'Triposes,' implying examination in special subjects, have sprung up by the side of the older schools.

It has probably been thought that the addition of jurisprudence and political economy to the subjects of the competitive examination would give it a more practical character, and thus to some extent meet these objections. I am afraid I cannot admit this. There are several statements

made about jurisprudence in these papers which I should call extraordinary, if I did not know that they are sometimes heard even from lawyers. It seems to be supposed that there exists a great abstract science, called jurisprudence, which will enable those instructed in it to solve actual legal problems without the trouble of referring to positive enactments or laws. Assuredly there is no such science. What is true, is that the rules and principles of every legal system may be stated in a simpler and more general form than that which they take when dispersed over judgments and text-books, and probably every really eminent lawyer effects some such generalisation and simplification for himself. If law, put in this form, be called jurisprudence, undoubtedly it helps to solve legal questions, and there would be great advantage in being familiar with it at starting. But then it happens that the Indian codes (apart from the codes of procedure) correspond to jurisprudence in this sense about as closely as any body of rules could do. They are law, stated as generally and simply as is consistent with practical usefulness. Nobody, however, proposes that the codes should enter into the competitive examination, and indeed in some passages of these papers they are contrasted with jurisprudence. But, whatever this last word as used in these papers may mean (and it may bear several meanings and may indicate several interesting branches of study), it will not support the argument of the writers unless it be taken as equivalent to codified law.

I do not deny that political economy, as set forth in the ordinary manuals, has sufficient precision to be a subject for examination. But this precision is obtained in great measure by a series of assumptions which are not by any means absolutely true of India. Political economy, as ordinarily understood, takes for granted that private or individual property exists as an institution, that its forms are perfectly distinct, and that its actual distribution has been determined by causes of so old a date that no inquiry into their propriety ought to be permitted. But, over much of India, individual property is still imperfectly disentangled from common property, its forms are often extremely indistinct, even to the most careful observer, and its distribution over whole provinces is due to

measures taken not a hundred years ago, in some provinces not twenty years ago. In fact, political economy, if studied by itself, is a source rather of confusion of mind than of clearness of thought in Indian officials, and it is one great merit of the special studies insisted upon by the Civil Service Commissioners, that they include not only political economy, but the history of tenure as established by the comparative method and a part of what the writer of an interesting paper in the collection calls 'Archi-Sociology.' (*See* Mr. Ibbetson's paper of August 4, 1875.)

The plan of Lord Northbrook and of the Master of Balliol is avowedly intended to facilitate the entrance of university men into the Indian Civil Service, and perhaps an enemy might describe it as a proposal to sacrifice all other considerations to the interests of the universities. I believe that, if it succeeded, it would at most come to the universities sending us their second-best men, keeping their best for themselves. But I strongly suspect that it would not succeed, and that the number of university men entering the service would be smaller than ever. It must be remembered that by advancing the maximum age for competition, you enormously intensify its keenness. The man who competes in this examination at 22 would have a terrible stake on his own running. Nothing could be more pitiable than his position if he failed, for he would be unfit and too old for nearly any other occupation or profession. I think that the competitors under such circumstances would throw aside every weight, and would not allow themselves to be distracted by the requirements of a university course, which are not at all necessarily coincident with the training most likely to secure success in competition. No doubt they might be forced into the universities, but, apart from compulsion, I think it probable that they would keep aloof from them even more commonly than at present.

Let me add, that we ought not to leave the defeated competitors in these examinations altogether out of account. Their number increases every year, and already the hopelessness of their position is severely felt by a host of families. But every year by which the maximum age of competition is advanced necessarily adds to the number of the unsuccessful, and the

postponement of the minimum limit of age from 17 to 19 would make matters worse, since the competitors lose the opportunity of essaying their powers at an early age, and of declining the contest in future if they find themselves unequal to its strain.

On the proposal to send the successful non-university candidates to the universities for a single year, it seems to me sufficient to observe that the universities would probably decline to receive them for so short a period. No doubt the course of two years would be regarded at Oxford and Cambridge as somewhat unduly short. If it were necessary to argue the point, I believe I could show that no studies worth mentioning could be prosecuted in a twelvemonth, nor could proficiency in them be satisfactorily tested.

The plan I venture to submit rests on a different view of the competitive examination from that which has apparently been adopted by Lord Northbrook and Mr. Jowett. I imagine that they compare selection for the Indian Civil Service to a college fellowship obtained soon after a university degree. It seems to be supposed that a certain number of university men, after graduating, will present themselves at our competitive examination in lieu of competing for a fellowship or after competing and failing. I think there is a general feeling that the lateness of the period at which fellowships are obtained is a very serious drawback on their value, even to those who enter less active professions than the Indian Civil Service; but, apart from that, if academical analogies are to be followed, I submit that the truest analogy is not between selection for the service and success in a fellowship examination, but between selection for the service and success in an examination for an open scholarship or exhibition. It is by means of scholarships that the universities retained their hold on the youthful ability of the country even in the darkest times, and they are prizes appropriate to a period of life when it is even more important to have proof of industrious habits, of clearness of head, and of quickness of apprehension, than of the possession of special or even of useful knowledge.

The papers received from India leave no doubt on my mind that the candidates for the service, once elected, should

be placed under new conditions during the remainder of their stay in this country. A lively picture of the life which they are now compelled to lead may be found in Mr. Risley's letter of August 10, 1875, addressed to the Government of Bengal, paras. 14 and 15; and such statements of fact are worth a bushel of opinions. The idea of collecting the selected candidates in a single college, like Cooper's Hill, does not, it will be seen, command any great amount of favour, much less favour, indeed, than might have been expected from the affectionate recollections of Haileybury which have not quite died out in India. Probably it will be admitted that, with the older universities willing and even eager to receive our young civilians, only the very strongest reasons would justify us in repeating on a larger scale the costly experiment of Cooper's Hill, and no such reasons seem to me to have been adduced. The objections, again, to confining the candidates to a single college at Oxford or Cambridge are very formidable. Such a college would rapidly acquire a special tone of its own, and thus some of the best indirect effects which are promised from residence at the universities would be sacrificed. Those who know Oxford and Cambridge best have no fear that the candidates, if dispersed over several colleges, will see too little of one another; their studies and objects will be so distinct from those of other undergraduates that they will probably flock together too much rather than too little.

I suggest, then, that we should adopt the proposal which was put to the Civil Service Commissioners, and which, of all those hinted at in the letter from this office, was received by them with least disfavour. It would, in that case, be announced that, after a certain date, the allowance made by the Secretary of State to the selected candidates would cease, but that every candidate entering a university which satisfied certain conditions would be regarded as the holder of a scholarship of 150*l.* a year so long as he resided there. Lord Northbrook suggests that the university chosen should always include colleges, but, on the whole, I prefer the more general words employed in the letter to the Civil Service Commissioners—'Some university at which moral responsibility for the conduct of the students is undertaken, and rules of discipline enforced.' I

suggest this change in the training not only as being in itself good, but as involving the least disturbance of existing arrangements, and as satisfying the greatest possible number of claims to share in the supervision of our selected candidates.

If the selected candidates are only to be sent to an university for a single year—a proposal, as I said before, which I think the chief universities would decline—the nature of their studies during that year, and the tests applied to their proficiency, do not seem to me of any great importance. But if their residence is prolonged during two years or more, I think it essential that they should be subjected to much the same searching periodical examinations as at present. The old complaints of Oxford and Cambridge, to which the majority of our candidates may be expected to go, that they are places of luxury and prodigality, have recently been heard in Parliament, and they may be read in these papers. Whatever ground there may be, or may have been, for such complaints, assuredly they could never be justly made of the working or reading class of undergraduates. At the universities, as elsewhere, idleness, not industry, has always been the mother of mischief. It seems to me essential we should have security that the selected candidates work fairly hard during their years of probation. Now I must frankly state that I doubt our having this security even from the chief English universities (for the present at all events) if we trust them to apply their own tests to the progress of our candidates. They have a deserved reputation for the stringency and impartiality of their examinations in the older branches of study, which are controlled by a considerable mass of public opinion and by old traditional standards. There would not be the same ground for confidence in the tests applied to the studies of a new class, somewhat outside the rest of the university, who would very generally be examined, like the young men at Haileybury, by the very same persons who had taught them in lecture rooms. On the other hand, if I may judge from my own experience, the periodical examinations of the Civil Service Commissioners are as searching as any in the country.

Moreover, if each university were permitted to examine

the selected candidates attached to it, not only would there be danger of considerable variability in the tests employed, but there would be great waste of machinery, which cannot be very cheap if it is to be very efficient. Not only Oxford and Cambridge, but the University of Dublin and the Scottish Universities, must have each a staff of special examiners, and the Secretary of State, through the Civil Service Commissioners, must keep up a staff of his own, for the sake of the candidates who cannot be induced to select any university, possibly because they prefer to remain under parental control.

The periodical examinations are now held in October and November and in April and May, of all months the most inconvenient for a resident at Oxford or Cambridge. There would be no difficulty whatever about holding them in July and at the end of December or beginning of January, in which case they would not interfere in any way with university residence. Further, I think that the obligation of attending courts of justice, drawing with it the opportunities of occasional release from university discipline, might be considerably relaxed. A certain amount of attendance is likely to be extremely useful, but the amount actually required seems to me altogether excessive. I imagine that the rules on the subject were drawn up before the codification of Indian law had gone as far as it has done, and in particular before the Indian law of evidence had been codified. The most useful exercise which can now be imposed on a young civilian is not to pick up a little law from a trial or an argument, but to acquire as much as possible of the generalised law of the codes by an effort of memory, which is less distasteful in earlier than in later life.

There are some further but minor changes in the periodical examinations which seem to be desirable, but it would be premature to discuss them before the nature of the training to be given to the selected candidates has been settled.

MEMORANDUM ON MR. CAIRD'S REPORT ON THE CONDITION OF INDIA

FEBRUARY 20, 1880.

IN 1879 Mr. James Caird, C.B., was appointed a member of the Indian Famine Commission. In a letter to the Home Secretary on this subject Lord Salisbury expressed an opinion that, apart from Mr. Caird's special duties as a member of the Commission, advantage to the Indian cultivator might be expected to result from his inquiries, and from the advice which he would be in a position to tender to Her Majesty's Government. Mr. Caird, accordingly, after spending about four months in India, submitted a report dated October 31, 1879, which was presented to Parliament and sent out for observations to the Governor General of India in Council. The Government of India sent home an exhaustive reply on June 8, 1880. In the meantime Sir Henry Maine wrote the following memorandum on Mr. Caird's report:

It would not, I think, be an unjust or inexact description of Mr. Caird's report if I were to say that the writer proposes to reverse the entire history of British India. I believe there to be scarcely one of the political, administrative, judicial, and fiscal arrangements recommended by him which might not have been found in India during the beginnings of British rule. It is certain that at first there was no central or Supreme Government, and that the various British territories, separated by wide distances from one another, were virtually independent provinces. Whatever justice was administered beyond the British factories and the space of ground sheltered by them, was administered by Natives under Native institutions, and, assuredly, without the smallest reference to English law. The revenue in the territories first ceded to the East India Company was taken in kind; and after a century of anarchy and confusion, the now exploded assumption was universally made that all the land of India belonged to the state. There was no organised Civil Service, and most of the servants of the East India Company who, after a while, rose to distinction, had been military men. There was no necessity for 'closing the costly Department of Public Works,' since it did not exist, and the large Native works were falling everywhere into ruin. The transition from British India as it then was

to British India as it now is was very gradual. Each step onwards was supposed to be suggested by the experience of the past, and no step was taken till it was believed to have the approval of the local Indian experts most in credit. There never was a system which, after the first, grew up less at haphazard than that under which British India is administered and governed. It would almost take volumes to show this by anything like an accurate account of the changes introduced by the authority of the Indian Governments and of the East India Company; but the point is clear from examination of the acts of parliament which together make up the Indian constitution. I am not sure that Mr. Caird is quite aware how many acts of parliament he seeks to repeal. The greater part of the institutions he would change derive their legal status, not from any Indian authority, but from a long series of statutes, each amending, modifying, or extending the last. The Supreme Government of India thus derives its constitution and powers from many successive acts of parliament, of which the earliest is the Regulating Act, 13 Geo. III., c. 63 (1772), and the latest 32 & 33 Vict., c. 98 (1869). The Executive Council of the Governor General, which Mr. Caird would abolish, was the subject of legislation from 1772 to 1861, and indeed to 1874—from the Regulating Act to the Indian Councils Act and the Act amending the last, 37 & 38 Vict., c. 91. The Indian judicial system, so far as it is not of local origin, begins in a charter of 26 Geo. II., 1752. Parliament legislated respecting the Indian covenanted civil service in 1793 (33 Geo. III., c. 52); and it is now affected by no less than seven succeeding Acts. The mode of recruiting it by competition from among Her Majesty's subjects at large was first of all introduced in 1853 by 16 & 17 Vict., c. 95, and it now rests on 21 & 22 Vict., c. 106 (1858). If anybody will be at the patience to examine these several strings of statutes, he will find that each enactment adopts the preceding state of the law as the basis of legislation, and then fortifies, enlarges, or abridges it. Almost all the changes carried out by Parliament were made on the recommendation of committees of both Houses, which sat for long periods of time, and took the evidence of as many Indian experts as

were available, whenever the time came round, at intervals of twenty years, for renewing the East India Company's lease of Indian government.

I certainly do not deny that an intelligent man, during a three or four months' stay in India, in which he has made the most of his opportunities, may detect some errors of defect or excess in policy which escape eyes habituated to the existing system of government and administration. But I earnestly protest against regarding the established Indian constitution as deserving to be dealt with differently from any other result of accumulated experience. I claim for it the ordinary presumption against change which throws the burden of explicit and laborious proof upon the advocate of change; and, indeed, I assert that there is the strongest presumption against sweeping change when the institutions in question are so unexampled in the political history of mankind as are those of British India. All the laws which I have cited, and a mass of regulated arrangements to which I have not had space to refer, are not seriously discredited by a number of generalities so wide and vague that half a dozen meanings can be attached to each of them. I again wholly deny the Indian constitution to be so slightly rooted that it could be torn up without far-reaching disturbance. Apart from the good or evil in Mr. Caird's proposals, I believe that their adoption would give a dangerous wrench not only to native Indian society, but to the large portions of English and European society which are now bound up with India. This remark is not made rashly, as may be seen by one consequence of only one of these recommendations. Mr. Caird proposes, *le cœur léger*, to abolish the Government of India. But most of the considerable Indian public debt has been raised on the security of the Government of India, not on that of the Provincial Governments; on the face of the India 'rupee paper,' it is the Governor General in Council who promises to pay. For this security, Mr. Caird, without asking the consent of the public creditor, proposes to substitute that of the Provincial Governments—a much worse security, if my observations of provincial finance can be trusted. If the Supreme Government of India could really be abolished—

which I myself believe to be impossible—Parliament, which alone has authority to provide for the abolition, would be forced to secure the Indian creditor against loss; and thus that gravest of all financial questions, the question of an Imperial guarantee for the Indian debt, is involved in a mere detail of only one of Mr. Caird's proposals.

I have no intention of entering on a speculation as to the possibility of dispensing with the Supreme Government of India. There must be a mass of papers, either among the India Office records or at Calcutta, in which a rational and much less extreme form of this idea is discussed under the name of 'decentralisation,' and those who have followed recent Indian history do not need to be informed that, ever since Lord Mayo's Viceroyalty, the experiment of limiting the authority of the Supreme Government in some important particulars has been tried with conspicuous success. Leaving the further examination of the question to those who have had a larger local experience than I have had of the actual relations between the Supreme and Provincial Governments, I pass from it with the remark that one consideration alone seems to show that the Supreme Government of India cannot be abolished, though its seat may be shifted. Let us suppose that all authority over British India has been distributed between seven or eight Provincial Governments independent of one another. Each of these Governments will, not the less, be of a type hitherto unexampled in the world. In each of them, a handful of foreigners will be ruling over many millions of Natives, divided from them by race, colour, religion, language, associations, and domestic institutions. Unless each Government is to become a stern irresponsible despotism, all must be brought under the strict control of some authority above. Unless the action of the whole group be harmonised, there will be endless confusion. Unless every province is to be financially self-supporting, which is at present out of the question as regards some of them, there must be some superior power to regulate the drafts of the poorer on the treasuries of the richer Governments. The question, therefore, is not whether there shall be a Viceroy somewhere, but where he shall be. If the seat of the Supreme Government be not at

Calcutta or Simla, it will have to be in Downing Street; and the same central authority which is now exercised by the Government of India will have to be exercised by the Secretary of State in Council, under (I venture to think) far greater disadvantages.

I pass, however, to assertions and arguments in Mr. Caird's report which have a more immediate interest for a former law-member of Council. Thus I find the writer speaking (p. 5) of the 'moral disorganisation produced by laws affecting property and debt not adapted to the condition of the people.' Again, the English officers are said (p. 6) to be 'enforcing a system of law the justice of which (the Natives) are slow to comprehend, while its costliness and delay are manifest.' And the law responsible for all these consequences Mr. Caird over and over again asserts to be English law. 'The error,' he writes (p. 11), 'has been in substituting the ideas and detail of English law affecting property and debt for those of the East.' He states in his 'Notes by the Way in India' (p. 726), that the conclusion established by that series of papers is that 'the application of the principles of English law as between debtor and creditor is becoming widely disastrous.' He quotes ('Notes,' p. 716) with approval the opinion of a Native witness that the sufferings of the indebted Dekkhan peasantry were caused by the Indian Limitation Act of 1859,[1] which he seems to regard as being in some way connected with English law. And the most general proposition which observation of India has suggested to him is that 'India needs better Native agriculture, and less English law.'

These sweeping accusations are extremely perplexing to one who has made the usage, law, and legislation of India his principal study for not much short of seventeen years. They are couched in such general terms that they may be construed in many different ways, but in their most obvious meaning they seem to be in diametrical contradiction to the facts. Of all the charges ever brought against Anglo-Indian officials, perhaps the most grotesquely unfounded is that they have

[1] Repealed by Act IX. of 1871. The present Indian Limitation Act is Act XV. of 1877.

introduced English ideas concerning property into India. The truth seems to me rather to be that they have taken too much pains to ascertain Indian ideas. By their careful and long-continued investigations they have created a vast literature of Native Indian land tenure, which is of the very highest historical, archæological, and sociological value, but which has, perhaps, the defect of not suggesting conclusions as distinct as for practical purposes might be wished. One instance of the application of English ideas to property has, indeed, become memorable in British Indian history, the Permanent Settlement of Lower Bengal by Lord Cornwallis; but a writer who proposes a standing commission (Report, p. 18) for introducing the purely English conception of 'freehold' ownership into India can scarcely quarrel with the Permanent Settlement. What is meant by saying that English notions as to debt have been too freely imported, I do not understand. The only 'idea' that can be said to have guided Anglo-Indian legislation and the action of the Anglo-Indian Courts on the subject is the idea of obligation incurred by contracting debt. The principle that a man ought to pay his debts is doubtless found in English law, but it is also found in the written Hindú law, and (as far as I know) in all unwritten Hindú custom, and it stands out with a peculiar distinctness on the face of the Muhammadan law.

I am driven to conjecture that Mr. Caird has not fully understood a certain kind of complaint which is commonly addressed to persons new to India, and believed to be invested with some degree of authority. Like Mr. Caird, I have often heard valuable public servants lament the decay of 'patriarchal' administration. The officer of Government who uses this language does not, as at first sight might be thought, propose to turn over the dispensation of justice to chiefs of tribes and heads of families. What he means is that he ought to be the patriarch himself. He regrets the growing number of rules which abridge his discretion, and which he must obey under penalty of rebuke from his superior or from some court of appeal; and I have noted that he is exceedingly apt to give the name of English law to the rules he dislikes. There is, in fact, a conflict always, more or less, proceeding in

India between two systems, each excellent in its place—the reign of law and the regimen of discretion. The rational conclusion to arrive at is, not that either of these systems should be given an unqualified ascendency over the other, but that the limits of both should be most carefully adjusted to the varieties of the Indian population. For my part, I have the strongest sympathy with the preference of some Indian officials for discretionary administration, where the people have not outgrown it; and nobody impressed on successive Secretaries of State more earnestly than I did the urgent necessity of procuring the enactment by Parliament of some such measure as statute 33 Vict., c. 3, secs. 1 and 2, by which the preservation of the discretionary system in parts of India has been materially secured.[1] But it is vain to deny that this system is inconsistent with even a slight advance in the people to which it is applied, and that thus the area over which it is applied is constantly diminishing. In the first place, unless it is to degenerate into loose and capricious tyranny, it demands great industry and great conscientiousness in the men in whose hands it is placed; and though these qualities have often been found in a large number of Indian officials, they are not the less, on the whole, rare qualities, and there is no perennial or unlimited supply of them. Secondly, the discretionary administration of justice is incompatible with a high and even a moderate degree of commercial activity, for this imperatively demands a strict uniformity in the interpretation of law, and particularly in the construction of agreements. No considerable undertaking could be carried out if the way in which the subordinate contracts were to be performed depended on the light in which they were seen by a score or two of military gentlemen placed at great distances from one another, and guided by an untutored sense of justice. Lastly, I believe the regimen of discretion to be thoroughly unpopular with the Natives of India.[2] I have never conversed with an educated Native who did not seem to abhor it; but I do not rely so much on this as on the evidence of a similar feeling in other and much more numerous classes. The bill,

[1] See above, p. 360.
[2] See the remarks of Sir Sayyid Ahmad above, p. 62.

of which a portion became the Bombay Land Revenue Code (Bombay Act V. of 1879), had much to recommend it, but if ever there were signs of a real popular effervescence against proposed legislation, they showed themselves in respect of this measure. And the popular grievance was that the discretion of officials was to be enlarged by it at the expense of the jurisdiction of the courts of justice.

If the language of Indian public servants, who see only one side of the gold-and-silver shield, has led Mr. Caird into misapprehension, it must have been increased by a specific error into which he appears to me to have fallen. I cannot construe the concluding paragraphs of his 'Notes by the Way' otherwise than as showing that he supposes the Indian Supreme Courts (which undoubtedly administered English law) to be still in existence, and to be exercising jurisdiction over the whole of India. These paragraphs are apparently condensed from the third volume of James Mill's 'History of British India;' but Mr. Caird does not seem to have noticed that Mill's condemnation of the technicalities of English law and of their introduction into British India applies only to a particular stage in the history of Indian judicial institutions, and a comparatively brief one. The Supreme Court of Calcutta was established in 1774, under statute Geo. III., c. 63, and it immediately began those usurpations of general jurisdiction over the interior of Bengal which are graphically described in Macaulay's essay on Warren Hastings. But Parliament was roused by the vehement protests of the East India Company, and six years afterwards, in 1780, it passed 21 Geo. III., c. 20, which expressly recites that it is designed to protect 'the native inhabitants of the British provinces in India in the enjoyment of their ancient laws, usages, rights, and privileges.' This statute effectually clipped the wings of the Supreme Courts. It substantially reduced them to the footing of local courts for the presidency towns or cities of Calcutta, Madras, and Bombay; and even in these cities all questions of contract, succession, and inheritance were to be decided by Native law where the defendant was a Native. The Supreme Courts retained a general civil jurisdiction where there was an agree-

ment of both parties to submit to it, and a general penal jurisdiction over Europeans; but, though they were to the last courts of much formal dignity, they no more exercised jurisdiction over all India than do the Liverpool Court of Passage and the Liverpool Recorder's Court over all England. The wrongs with which Macaulay in another capacity reproached the Supreme Court of Madras were suffered, if at all, by the citizens of the city of Madras, and not by the millions of Madras provincials. Finally, the Supreme Courts were abolished by Parliament in 1861, and since then the special jurisdiction which the existing High Courts inherited from them has been invaded and curtailed on all sides by Indian legislation.

I fully admit that, if there had been no countervailing force, an excessive amount of English law, and not always of the best portions of it, would have made its way into Indian jurisprudence. The quarter and the manner in which this danger has disclosed itself ought to be attentively studied by everybody who is disposed to share Mr. Caird's ideas. The tribunals which really administered justice to the multitudinous Native population of the British provinces were, not the Supreme Courts, but the so-called Sadr Courts and the local courts subordinate to them. Their jurisdiction was undoubtedly so defined from the first as to exclude the invasion of English law. In the absence of legislative enactments, they were directed to follow Hindú and Muhammadan law, and, if they could find no special rule, they were to act according to 'justice, equity, and good conscience.' The Hindú and Muhammadan laws, whether those words are construed to include the written sacerdotal systems passing under that name, or whether they are limited to Native usages actually practised, are not uncommonly supposed by persons who have not examined them to contain materials for the solution of all questions which can arise between man and man. In reality, they are in the highest degree vague and contradictory, they are excessively scanty, and in some of the great branches of jurisprudence they contain no rules at all. Some of the most violent and mischievous oscillations of Indian agrarian policy were brought about by the contradictory results reached by skilled Indian observers examining the

same department of Native usage with equal diligence and equal good faith. Hence the provincial judge, finding no pertinent Native rule, was thrown back on 'justice, equity, and good conscience,' and, as these standards of decision do not, unfortunately, carry us very far by themselves in legal matters, he consciously or unconsciously took his opinion from the only civilised system of jurisprudence accessible to him. English law, gathered from textbooks by provincial and sadr judges, was in fact creeping in on all sides, disguised as equity and good conscience. (*See* the language of the Privy Council, 9 Moore's Indian Appeals, 303.) But against this danger Parliament and the Indian Government have been struggling for half a century, the latter amid much interested contumely and ignorant misconstruction. Mr. Caird, in his 'Notes by the Way,' has quoted James Mill's denunciation of the superstitions of English lawyers, but he has not quoted the words with which the passage begins: 'The grand source of mischief to the Natives was the unfortunate inattention of the authors (of the institutions of 1774) to the general principles of law, detached from its accidental and national form.' (Mill, Book IV., cap. 9). These last words accurately describe the objects professed by Parliament when in 1833 and 1853 it directed the appointment of the two Indian law commissions, and those also of the Indian Government and Legislature in passing the series of measures not altogether happily called the Indian Codes. These measures are intended to provide a legislative basis of rules in all the great branches of jurisprudence, and, unless the express command of Parliament is neglected in them, 'due regard is to be had to the rights, feelings, and peculiar usages of the people of India.' These measures are not nearly complete, and I have been too much associated with some of them to venture to assert that they have been always on a level with the beneficent intentions of Parliament; but the language which I sometimes hear about the Indian Codes, and which I more than suspect has been used by some of Mr. Caird's informants, betrays an astonishing confusion between the disease and the remedy. There is a real tendency in English law, which is one of the most minute and extensive (though not one of the most

orderly) of legal systems, to make its way into India through judicial decisions, and this tendency can be combated in only one way, by the legislative provision of simple and distinctly stated rules, adjusted, so far as is possible and permissible, to Native modes of thought and peculiarities of feeling.

I will dwell for a moment on an early effort of systematic Indian legislation to which Mr. Caird's informants seem to have attributed a share in the sufferings of the indebted peasantry of the Dekkhan. The limitation of actions, that is, the period within which a legal right must be enforced, stands (while I write) for ordinary debts in England at six years, and stood in India at twelve years. But in 1871 the period was reduced in India to three years. Anybody familiar with the country will see at once that the policy of the measure, which was promoted by two Indian Chief Justices, was purely Indian. Frauds and perjuries abound amid the Indian population, and it was in the highest degree desirable to protect helpless defendants against old demands of ten or eleven years' standing, attempted, perhaps, to be established by forgery and false swearing, but at the best rebutted with the greatest difficulty, on account of their staleness. There is no reason to suppose that this part of the law of 1861 has not succeeded in its main object, and I hope that nobody will be foolish enough to propose its repeal. But Mr. Caird quotes with manifest approval the statement of a Native informant ('Notes by the Way,' p. 716), that this 'well-meant attempt to restrain the accumulation of interest . . . has greatly increased litigation, and proved injurious to the borrower . . . For the creditor, to prevent his claim being barred by time, not in order to recover the debt, must file a suit every third year, the cost of which thus falls on the debtor four times in twelve years instead of once. The bond at each time is renewed with added interest. The debt thus assumes four new forms during a period of twelve years, and, with interest at 33 per cent., doubles itself every third year.' I assert that this is a gross and, on the part of the Native informant, a highly suspicious misrepresentation of the law. No enactment prepared by a rational man, not to speak of two eminent judges, ever provided that, in order to prevent a bond-debt from being

barred by time, a new bond must be executed. All that the Act really requires is a written admission or acknowledgment of continuing liability. (*See* the successive Indian Acts, XIV. of 1859, s. 4, IX. of 1871, s. 20, XV. of 1877, s. 19.) Of course I do not deny that the Dekkhan money-lender may have told the Dekkhan peasant that, in order to keep himself from being sued, he must execute a fresh bond, with interest and principal consolidated. But this is merely a false statement as to the law, and I may add that the misrepresentation of Government orders and laws is a very common basis for Indian frauds. In this particular class of cases, I have it on the best authority, that the nature of the transaction is always shown on the face of the bond, still each new bond invariably recites, not the existence of the antecedent debt, but (of course falsely) a loan just made of money equivalent to the old principal and interest.

It is proper that, after examining Mr. Caird's condemnation of the principles of Anglo-Indian law, I should say something on his proposals of reform in the Anglo-Indian administration of justice. At page 28 of his Report I find the following sentence :—'The costly English Civil Service should be limited to such numbers in each presidency as would supply European snperintendence for each district, and an appeal judge, to whom appeal from the Native courts would lie.' And again at page 29, 'For the office of appeal judge, men should have legal training, and that should include Hindú and Muhammadan law.' I quote these passages to justify me in saying that the proposal, so far as it relates to judicial changes in India, is quite unintelligible. Taken in one sense, Mr. Caird's words merely describe existing facts. There are very many districts in British India in which there is only one judge of civil appeal, who must, by Act of Parliament, be a covenanted civilian; and, under the present arrangements of the Secretary of State, he must receive a 'legal training' before he goes out, and this training does include 'Hindú and Muhammadan law.' As, however, Mr. Caird seems to be recommending something new, I am driven to suppose that his silence is significant, and that he desires to abolish the High Courts, which he does not mention. There are now

four High Courts and one Chief Court in India, in which covenanted civilians sit with English and Native lawyers. In the High Court of Bengal alone there are thirteen judges, and ninety-nine hundredths of their business consists in hearing first or second appeals from the interior of that law-loving province. If Mr. Caird really proposes to abolish these courts I can only express my astonishment. Possibly he confounds them with the abolished Supreme Courts which they have absorbed and superseded, and supposes them to be openly administering pure English law. Perhaps he thinks that, if Native courts were greatly multiplied, appeals might be largely diminished. Nobody wishes more than I do to give increased judicial employment to the Natives of India; nobody rejoices more that statute 33 Vict., c. 3, s. 6, was passed; but I am afraid that the multiplication of Native judges will rather add to the necessity for the control of appeal. If Mr. Caird had sat by the side of the judge in an Indian court of justice, he might have heard much acute and subtle argument from Native lawyers, couched in excellent English, but he would have noticed in their speeches a somewhat inordinate love of technicality, a certain inattention to the merits of the case, and a certain want of what we here call common sense. These are defects which Native judges would carry with them to the Bench, and there is no way of correcting them except by appeal. The cautious limitation of the power of appealing, for which the Natives of India have a strong but not quite wholesome taste, is exceedingly desirable, but the difficulty of curtailing it is rather increased than otherwise by the freer employment of Native judges.

Mr. Caird's farther proposals of judicial reform are as follows:—'The employment of pleaders in Small Cause Courts should be forbidden, and the whole responsibility be cast upon the judges. The native Punchayet Courts should be recognised. The fees exacted by Government in Small Cause Courts should be abolished.' These recommendations are again very puzzling when compared with the facts. Over much the greater part of India a Small Cause Court is a special court, presided over by a judge selected for special qualifications, who adjudicates without appeal. As the principal check

on the judge, and the principal guarantee for his thoroughness and fairness, is the presence of a Bar, a Small Cause Court seems to be about the last Indian tribunal in which the employment of pleaders can be safely discarded. As, moreover, in spite of their name, these courts have now a jurisdiction over demands of not inconsiderable amount,[1] and as, through the absence of appeal, the justice administered by them is on the whole cheaper than elsewhere, it is hard to understand why a different principle should govern the fees which they levy from that which is applied to other courts. The suggestion that the Native Panchâyat Courts should be recognised is also extremely obscure. A Panchâyat is a body of five arbitrators, and sections 525, 526 of the Code of Civil Procedure[2] plainly recognise the award of such a body, and provide for its being filed in court and enforced by legal process. Here, again, I can only comprehend Mr. Caird's proposal by comparing it with the evidence of the Native informant whom he met at Puna ('Notes by the Way,' p. 716). No doubt the system of arbitration recommended by this person is not that of the Code of Civil Procedure. The code contemplates an arbitration to which both parties have agreed, and I may observe in passing that, if this informant rightly stated that both 'sowcar[3] and ryot would prefer the Panchâyat,' they can even now have it at any moment. But other parts of his statement leave no doubt on my mind that he meant to dispense altogether with the assent of the litigants and to force them back on some form of the ancient Indian Panchâyat, sitting under village authority, and generally consisting of the village council of five, with the headman presiding, wherever that village officer is found. On this assumption we must at once exclude from Mr. Caird's universal remedy the seventy millions of souls who inhabit Lower Bengal, in which the village organisation has long since perished.

I am the last person to deny interest and value to the village community and its characteristic institutions. It is a primitive, natural, social organism. It seems to have been

[1] Rs. 500 under Act XI. of 1865, sec. 6, extendible under sec. 7 to Rs. 1,000. See now Act IX. of 1887, sec. 15.

[2] Act XIV. of 1882.

[3] *Sáhukár*, a native banker or money-dealer.

continued longer among the Hindús than among other communities of the same race by the prevailing anarchy of the country, and doubtless they owed to it some rudimentary administration of justice when no Government existed outside the village capable of giving authority to court or judge. But to abolish the tribunals which have now existed in parts of British India for more than a century, and to go back to the village courts, is to follow the precedent set the other day by the Chinese Government, which, having got possession of the only railway in the country, proceeded to take up the rails and destroy the earthworks. You may dismantle the railroad, but you cannot prevent travellers from again wasting their time and becoming footsore. You may revive the village courts, but you will inevitably resuscitate the barbarism which went with them. Speaking generally, he who would bring to life again one of these barbarous institutions is placed in the following dilemma: either he must connive at many of their accompaniments which are condemned by modern morality and modern civilisation; or, in the attempt to give them a new character, he must so transmute them that they cannot be distinguished in any sensible degree from the modern institutions by which civilisation has superseded them. I venture to say that every reader of the ancient Hindú law-books will be convinced that, even in the comparatively dignified courts which took their procedure from these treatises, the perjury of witnesses and the corruption of judges were common though reprobated, and all evidence was subordinated to cruel and superstitious ordeals amounting to torture.[1] Now these are the very faults of Native character and the very Native practices against which British Indian administrators are still struggling. Perjury and corruption are still deplorably common in India: ordeals are perpetually resorted to in private life; and it is with the greatest difficulty that public officers, such as policemen, can be kept from extracting admissions by torture. If there is improvement in all these particulars, it is mainly owing to the British courts, which are in truth at the same time great schools of veracity and of

[1] See as to the Hindú ordeals, V. N. Mandlik's *Vyavahára Mayúkha*, Bombay, 1880, pp. 16, 20, 66, 75, 134, 210–214, and E. Schlagintweit, *Die Gottesurteile der Indier*, München, 1866.

judicial purity, and are also great educational agencies, as furnishing examples of a just and rational method of ascertaining facts. But these courts it is now proposed to close against the bulk of the population. It is true that Mr. Caird has some dream of a system of 'supervision,' which is to maintain all that was good in the village courts and to remedy all that was bad. Here we have the other branch of the dilemma presented to him. Nothing short of a system of appeal and control strongly resembling that now existing would keep these courts effectually in order; and I have a very strong suspicion that, if Mr. Caird were required to furnish us with a picture of the sort of tribunals he contemplates, with all the details filled up, it would turn out to be already provided for in the Code of Civil Procedure.

It cannot for a moment, I think, be doubted that any forcible revival of an obsolete mode of administering justice would be profoundly unpopular. This conclusion is, indeed, involved in the reasons for the proposal; for if the Natives of parts of India resort too freely to the British Indian courts, I presume that it is because they like to have recourse to them. Meantime, I do not in the least believe that they would relish the substitute. I agree with the remark of a Native writer, quoted in the debate on the Dekkhan Ryots' Relief Bill, that in days when Hindú sons will not submit to their father's exercising his *patria potestas* over them in his house, it is not probable that Hindú fathers will submit to the artificial and conventional authority of the council and headman of their village. If these outworn institutions were invested by Government with a new authority, I should expect that one of their first results would be a series of those local commotions which are produced in India by the sense of a denial of justice.

I do not question Mr. Caird's good intentions towards the Natives of India. I feel assured that his philanthropy is shown in suggestions for the improvement and extension of Native agriculture, which have but a slender connection with these recommendations of root-and-branch changes in Indian government and administration. But I cannot but see that some of his opinions have been taken from men who have formed a

very low estimate of Native rights and Native capacity. I, too, have met in India the sort of man who is constantly arguing, with Mr. Caird, that the distinction of race between Natives and Europeans should be recognised in all things, and I have observed his admiration of the Dutch system of management in Java, about which, however, he did not seem to know much except the fact—known, I imagine, to Mr. Caird also (*see* 'Notes by the Way,' p. 726)—that it rested on forced labour. Mr. Caird, however, is evidently not aware that the conscience of the people of Holland has been roused of late on this question, and that one of the political parties into which the Dutch, like other communities, are divided has for its characteristic policy the reform of the institutions of Java and their assimilation on many points to those of India. As to the Egyptian system, I can but recall the conclusions of a friend of mine who carefully observed it, with the aid of an experience of India gathered during twice as many years of residence in the country as Mr. Caird has passed weeks; and he came away from Egypt with a very good opinion of its solvency, but with a determination never to hold a single security on which the interest was provided by such gross oppression. Let me add that these assertions of an ineradicable difference between the different races of mankind belong to a now exploded philosophy. A great number of researches carried on in a great number of fields tend to prove that the conspicuous superficial differences which for the time show themselves are far more due to external circumstances than to human nature. All men under the same conditions behave very much in the same way. And men are in nothing so like one another as in their appreciation of what is justice. I trust that no English statesman will ever convince himself that there can be two ideals of justice for India; but, if he does, he must persuade the English Parliament to agree with him. I am almost ashamed to appeal to the authority of Parliament on such a point, but at present its pleasure is that there shall be the same 'general system of judicial establishments for all persons whatsoever, whether Europeans or Natives,' in India, and, as far as 'the rights, feelings, and peculiar usages of the people' will admit, the same system of

law. (*See* the recital which begins s. 53 of 3 & 4 Will. IV., c. 85.)

There is one other subject touched upon by Mr. Caird which I should wish to notice before closing this paper. It happens that, through accident, I have had occasion to observe narrowly the mode in which the Indian Civil Service is recruited, and the method of training it. Mr. Caird has now proposed that nine-tenths of the Civil Service (Report, p. 29) should be taken from the Army. When he says that the Indian Civil Service has already 'much of a military character,' he means, I presume, to remind us that there are many military officers in civil employment in India. This, of course, is the fact; and it is most unquestionably a great advantage to the Indian Government to be able to supplement their Civil Service by calling in gentlemen who, after some experience of the Army, have found civil occupations more congenial to their taste than military employment. But it seems to me that all which is possible would be done to destroy this advantage if what is now occasional become regular and systematic. For the inevitable result would be that a certain number of young men would every year enter the Army who had from the first no serious intention of discharging military duties. Of this the military authorities would be the first to complain, and, as it appears to me, most reasonably; but where would be the advantage to the Civil Service? At present both the British Army and the Indian Civil Service are recruited by competitive examinations of much the same general character under the superintendence of the Civil Service Commissioners. The cadets then go to Sandhurst or Woolwich; the civilians (whom Mr. Caird describes as coming to India 'fresh from the schools') go to Oxford or Cambridge, or some other university, where they pass a probationary period in studying the rudiments of Indian languages, and in obtaining some knowledge of Indian usage and Indian law, Hindú, Muhammadan, and Anglo-Indian. Are we to understand that the latter class would be better qualified if they substituted for these studies a training at the military colleges in fortification, gunnery, and drill? Under the existing method of occasional selection from the Army, there may be

real gain in training a certain number of public servants who have had two distinct experiences, one military and one civil. But this is because both careers have been seriously followed. If Mr. Caird's plan were adopted, the military service would not be followed seriously, and the preliminary training would be far inferior for general Indian purposes. It seems to me a contrivance for at once spoiling both the Civil Service and the Army.

As against Mr. Caird, I am compelled to appear as a general apologist of Indian law, administration, and government. As a fact, however, there are many things in them which I would gladly see changed, and hope to see changed some day, though the reforms I desire would appear trifling when compared with the radical innovations suggested by Mr. Caird. Thus, while I look upon the notion of abolishing the Supreme Government of India as chimerical, I should rejoice to see the independence of the Local Governments still further extended on the lines of Lord Mayo's policy. Again, although the abridgment of the discretionary powers of officials is inevitable, in my judgment, as India advances in knowledge, wealth, and commercial activity, I believe it to be the greatest of mistakes to fetter it too soon, or under the wrong conditions. Further, the litigiousness of populations belonging to the same social stage as the people of India is, so far from being extraordinary, a very frequently observed phenomenon: it appears to be their over-indulgence in the luxury of justice which is comparatively new to them; but unquestionably it may be carried to excess. The true remedy is, however, to be found, not in a violent recoil to the institutions of barbarism, but in the adoption of some of the newest legal expedients of civilisation. I have the greatest faith, for example, in the system of registration which is gradually spreading over India, and which nips litigation in the bud by causing the good faith and regularity of transactions to be sifted once for all in their initial stage.[1] Nor would I deny that the working

[1] See above, p. 128, and compare the Registration Act, III. of 1877, sec. 34, which directs the registering officer, before the registration of a given document, (1) to inquire whether or not it was executed by the persons by whom it purports to have been executed; (2) to satisfy himself as to the identity of the persons appearing before him and alleging that they have executed the document; and, (3) in the case of any person appearing as a representative, assign, or agent, to satisfy himself of the right of such person so to appear.

of the Code of Civil Procedure among very ignorant and helpless populations like the peasantry of the Dekkhan requires to be carefully watched. I have heard the Code called technical by those who have not read it, or who have not understood it, or who have not compared it with other systems of procedure; but it is, in fact, one of the simplest systems in the world, and it is its very simplicity which, in the case supposed, may be in fault. For it resembles other bodies of similar rules framed by civilised legislators in this—there is a point beyond which it does not protect the defendant who persistently neglects or refuses to avail himself of the opportunities of defence presented to him. For persons entirely at the mercy of men more powerful and more unscrupulous than themselves, it may turn out that a specially protective procedure is required. The new measure applied by the Indian Legislature to the Dekkhan peasantry [1] appears to me, I must own, somewhat unduly overlaid with protective procedure, and I am not without misgivings as to its operation. Nevertheless, carefully watched, as I trust it will be, it may yield us some valuable lessons regarding the best way of adjusting legal procedure to the circumstances of some special classes. Where the population is not of the character attributed to the indebted Dekkhan ryots, the provisions of the new law would, I am satisfied, prove quite intolerable.

STUDY OF PERSIAN

JANUARY 19, 1864.

THE following minute was inadvertently omitted from its proper place, which is next after the minute on the legal education of Civil Servants, supra, pp. 308–310.

Mr. Harington's argument on the question at issue seems to me conclusive.

The points which he establishes are these :—

1. That a knowledge of Persian was originally made compulsory for a reason which has lost its force.

2. That the retention of the obligation is attributable to an accident, or rather to a series of accidents.

[1] Act XVII. of 1879.

3. That the argument for retaining it, if carried to its consequences, would prove the officers of the Hindústání-speaking province of Bihár to be generally incapable of discharging their duties.

4. That the argument fails wholly in its application to military officers, who discharge judicial and administrative functions *pari passu* as the civilians in those districts of India in which the purest Hindústání is spoken.

5. That the footing on which it is proposed to place Persian is exactly that on which it is placed with respect to military officers, who all but monopolise the political appointments. That footing is, that its acquisition should be voluntary, it being understood that nobody who has not passed this voluntary examination is to be preferred to employment for which a knowledge of Persian is demonstrably required.

In short, it is evident that the reasoning by which the compulsory obligation to study Persian is advocated proves a great deal too much. And this, I take it, will always be the fate of all arguments which are invented by an after-thought, when the original considerations for which they are substituted have lost force or have disappeared.

The replies from the North-Western Provinces and the Panjáb are much what I expected. Those officers who are for retaining the compulsion do not, for the most part, allege more than that Persian is important—a proposition which nobody has denied. The gentlemen who go further than this are gentlemen of great reputation for a literary—as distinguished from a merely practical—acquaintance with Oriental languages.

It would not have been difficult to divine this result.

The opinion which has impressed me most is that of the distinguished Judicial Commissioner of the Panjáb. 'Life,' says Mr. Cust, 'is short: Art is long; in this, as in other things, we must have a minimum for the many, and a maximum for the few. We must not waste the precious years of a man's life between twenty and twenty-three, when he is able to acquire anything, and what he acquires remains for his life. I am no opponent of Oriental studies. I devoted my youth to them, and studied with success all the

five languages above alluded to,[1] and Arabic in addition; but I sometimes wish now that I had studied the Roman law, and been content with the Hindú law in English translations instead of following up dead Orientals beyond a certain point. I wish others to avoid my error.'

This pregnant passage goes to the root of the matter. The simple truth is, that the compulsory study of Persian—a difficult classical, and in India practically dead, language of limited though considerable usefulness—stands in the way of any effectual reform of the educational curriculum of young civilians. In particular, it obstructs their acquisition of the form of knowledge most urgently needed in the India of the present day—knowledge of law. If we are to choose between the incapacity of a Judge to decipher without aid the earlier records of his Court, and his incapacity to interpret the bearing on them, when deciphered, of legal principles, the first branch of the alternative involves immeasurably the lesser evil.

[1] Sanskrit, Persian, Hindí, Urdu, and Bengálí.

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[1] Another such definition was 'a despotism of office-boxes, tempered by the occasional loss of the key.'

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[1] One branch of this law—the law of guardian and ward—has, since Maine wrote, been codified by Act VIII. of 1890.

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